company because of his uncooperative conduct, it followed that the landlord could derive no rights from him. [17]

***28** In the present case, the trial court determined there was coverage, and we have affirmed. We therefore conclude that, contrary to TFM's arguments, the Leverettes were entitled to remain as plaintiffs in this case, at least to the extent of their subrogation rights to the proceeds of the Sanders' insurance policy limits. [18]

TFM also argues that Claire Sanders should have been dismissed from the suit because "there was no evidence that she suffered any damage." The insurance company contends that the agreement between the Leverettes and Sanders eliminated the possibility that "Claire Sanders will ever have to pay one penny to the Leverettes," and thus that she cannot show any injury for which the insurance company may be held liable. However, the Bedford County court rendered an enforceable judgment against Claire Sanders, and in the eyes of the law that constitutes an injury, whether or not that judgment is ultimately satisfied.

As to Plaintiffs Chad and Donna Sanders, TFM acknowledges that they were entitled to proceed on their breach of contract claim, but it argues that their claims for bad faith and for violation of the TCPA should have been dismissed because the Bedford County court did not enter a judgment against them. TFM thus contends that the Sanders should have been permitted to proceed at trial only upon their claim for medical payment coverage of $5,000. Even if the Sanders were not entitled to proceed against TFM for bad faith in their individual capacities, there can be no doubt that they had the right to proceed as parents and guardians of their daughter. Thus, the trial court did not err in declining to grant TFM's motion for judgment on the pleadings.

## IX. THE TRIAL COURT'S REALLOCATION OF DAMAGES

TFM's counsel argued vigorously during his closing argument that the jury should not award any damages at all to Claire Sanders because it was the minor's own foolish and reckless behavior that caused so much damage, and that "if you give money to Claire Sanders, what you may end up doing is rewarding her for causing all of this to begin with." His argument was apparently persuasive, for when the jury returned its verdict, it pointedly awarded "zero" to Chad and Donna Sanders as parents and guardians of Julia Claire Sanders. However, the jury did award Chad and Donna Sanders $1.2 million in their individual capacities as compensatory damages for TFM's bad faith. [19]

Plaintiffs subsequently filed a "Motion for Entry of Judgment on Special Jury Verdict." They asked the court to exercise its authority under Tenn. R. Civ. P. 49 to enter a judgment reallocating the damages awarded by the jury to better reflect the legal basis for those damages. Plaintiffs suggested that the court, acting as 13th juror, find that the jury awarded the verdict amounts to the wrong parties and that the weight of the evidence supported reallocation of the awards. The trial court's judgment, filed on September 14, 2010, was consistent with that motion.

***29** The court awarded $1 million, the amount of the Bedford County Judgment against Claire Sanders, to Chad and Donna Sanders in their representative capacity as parents and guardians of Julia Claire Sanders, and $200,000 to Chad and Donna Sanders individually. The $200,000 award is no longer at issue due to our vacating the judgment that TFM acted in bad faith, leaving only the award under the TCPA in place.

The court declared that reasonable minds could not differ as to the amounts of compensatory damages incurred by Chad and Donna Sanders as parents and guardians of Claire Sanders, including economic damages in "the respective amounts of $1 million and $1,845.75. [20] The court stated, however, that the jury had "misapprehended the effect of awarding the damages to M/M Sanders, individually, as opposed to M/M Sanders in their representative capacity." The court accordingly declared that it had decided to "exercise its authority under Rule 49 and/or Rule 59, to correct this obvious error by reallocating the damages."

TFM argues that by acting as it did, "the trial court failed to enter a Judgment reflecting the true jury verdict," and that "the trial court had no authority to alter the jury verdict." The insurance company cites several cases for the well-known principle that it is the trial court's duty to enter a judgment that is consistent with the jury verdict.

For example, in *State v. Morris,* 788 S.W.2d 820, 825 (Tenn.Crim.App.1990), the Court of Criminal Appeals stated that "the trial judge had no right to substitute for the rendered verdict a judgment that is substantially different." In *Ladd by Ladd v. Honda Motor Co.,* 939 S.W.2d 83 (Tenn.Ct.App.1996), this court stated that "[t]he verdict,

whether general or special, is binding on the trial court and the parties unless it is set aside through some recognized legal procedure. Accordingly, neither the trial court nor the parties are free to disregard a jury's verdict once it has been property returned." *Id.* at 94 (citing *Smith County Education Ass'n v. Anderson,* 676 S.W.2d 328, 336 (Tenn.1984)).

As even those quotes imply, however, the general principle is subject to some narrow exceptions. One such exception is found at Tenn. R. Civ. P. 49.02, which gives the trial court some leeway when there are inconsistencies between a general verdict and a special verdict.

> When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict, or may order a new trial.

In its judgment in the present case, the trial court stated that "the jury's special verdicts on the issues of liability on all theories are consistent with each other but are inconsistent with the general damage awards to the respective parties."[21] The court also found that "reasonable minds cannot differ about the damages incurred by Chad and Donna Sanders, parents and guardians for Julia Claire Sanders," and that those damages were the Bedford County judgments in the respective amounts of $1,000,000 and $1,845.75. The court concluded that it was obvious that the jury intended to award the amount of the Bedford County judgments, but simply awarded them to the wrong party, and it directed an entry of judgment consistent with that conclusion.

***30** Our Supreme Court has also suggested that the trial court is not relegated to an entirely ministerial role after a jury renders its verdict, for it interprets the law that the verdict must comply with. "It is for the jury to determine the facts and the trial judge to apply the appropriate principles of law to those facts." *Anderson,* 676 S.W.2d at 338. Accordingly, our appellate courts have approved judgments which deviated from the jury verdict in some respects when the application of the appropriate principle of law indicated that such deviation was necessary.

For example, in *Spence v. Allstate Insurance Co.,* 883 S.W.2d 586 (Tenn.1994), the jury returned a verdict of $4,990 against the party who allegedly set a house fire, causing a substantial insurance loss. The insurance company filed a motion to increase the judgment to $88,777, the amount the insurance company had been required to pay because of the fire. The trial court granted the motion, and this court affirmed.

Our Supreme Court also affirmed, ruling that the insurance company was entitled to be indemnified for its entire loss (the full amount of which was undisputed) and that the proper role of the jury as the trier of fact was simply to determine who was responsible for setting the fire. "It is moreover well settled that a trial court may modify a judgment when the damages awarded by the jury conflict with the undisputed facts concerning damages." *Spence,* 883 S.W .2d at 595; *see also Collins v. Summers,* 88 S.W.3d 192 (Tenn.Ct.App.2002) (affirming the trial court's upward adjustment of damages over the jury's general verdict amounts).

The trial court's judgment in the present case affirmed the jury's finding of liability for TCPA against TFM and the amount of its verdict for compensatory damages. It also agreed that the judgment was to be paid to TFM's insured. The court ruled, however, that as a matter of law, the portion of the recovery that represented the $1 million Bedford County judgment against Claire Sanders should be awarded to the Sanders in their representative capacity rather than in their individual capacity.

By modifying the verdict so the award would run in favor of Chad and Donna Sanders in their representative capacities as parents and guardians of Claire Sanders, the trial court was able to align the Sanders' legal obligations with the purposes of the jury award. Thus, the trial court acted properly, and its judgment did not violate the jury's role as the trier of fact.

## X. ATTORNEY FEES

TFM also challenges the trial court's awards to Plaintiffs of attorney fees and prejudgment interest. Both awards were included in the same judgment, but they merit separate discussion. The legal basis for an award of attorney fees in a claim under the TCPA is found in Tenn.Code Ann. § 47–18–109(e)(1), which states that, "[u]pon a finding by the court

that a provision of this part has been violated, the court may award to the person bringing such action reasonable attorney's fees and costs."

***31** Plaintiffs' motion for attorney fees was accompanied by a memorandum of law and by the affidavit of their attorney, Richard Matthews. The attorney testified that he had accepted employment with the Plaintiffs on a contingent fee basis for 40% of the gross amount of their recovery (if any) in addition to his costs. He further testified that he had not received any fees or costs from the Plaintiffs as of the date of his affidavit. He estimated that the actual time he expended on the case amounted to 351 hours over the course of 19 months and that he had advanced approximately $20,000 for expenses.

Mr. Matthews' affidavit also declared that reasonable hourly rates for his services in this case, in consideration of the factors set out in Rule 8, RPC 1.5 of the Rules of the Tennessee Supreme Court, would be $300 per hour.[22] He subsequently filed the affidavit of another experienced Columbia attorney, Russell Parkes, who testified that because of the amount of time the case would clearly require, the insurance coverage issues to be litigated, and the uncertainty of a favorable resolution of those issues, he would have been reluctant to accept representation of Plaintiffs on a one-third contingency fee basis. Mr. Parkes testified that in his professional opinion, a 40% contingent fee in the matter was "fair, reasonable and comports with the guidelines and factors set forth in Tennessee Supreme Court Rule 8 RPC 1.5." TFM did not file any countervailing affidavits.

The trial court awarded attorney fees to the Sanders in the amount of $1,202,214, which amounts to 40% of their $3,005,535 treble damages award under the TCPA.[23] TFM challenges the fee award on several grounds.[24] TFM argues that the attorney fee awarded by the trial court was not "reasonable," as is required by Tenn.Code Ann. § 47–18–109(e)(1) and by Supreme Court Rule 8, RPC 1 .5(a), but rather that it was excessive. The insurance company notes that 351 hours at $300 an hour would only yield attorney fees in the amount of $105,300, and that the trial court's award was over ten times the hourly rate. A trial court's determination of attorney's fees is within the court's discretion, and will be upheld unless the trial court abuses that discretion. *Kline v. Eyrich,* 69 S.W.3d 197, 203 (Tenn.2002); *Shamblin v. Sylvester,* 304 S.W.3d 320, 331 (Tenn.Ct.App.2009).

It can hardly be disputed that the fee awarded in this case is unusually large. Contingency fee arrangements can sometimes justify larger fees, however, because they "shift to the attorney some or all of the risk that the client's claim will result in no recovery." *Alexander v. Inman,* 903 S.W.2d 686, 696 (Tenn.Ct.App.1995). Our Supreme Court has accordingly stated that "[a]n attorney's fee should be greater where it is contingent than where it is fixed." *United Medical Corp v. Hohenwald Bank,* 703 S.W.2d 133, 136 (Tenn.1986). Ultimately, however, "the reasonableness of the fee must depend upon the particular circumstances of the individual case." *Wright ex rel. Wright v. Wright,* 337 S.W.3d 166, 182 (Tenn.2011) (citing *White v. McBride,* 937 S.W.2d 796, 800 (Tenn.1996)). Under the circumstances of this case, the size of the attorney fee awarded is excessive.

***32** When attorney fees are assessed against a defendant in a case under the TCPA, the defendant is required to pay those fees in addition to any judgment for violating the Act. *See Killingsworth v. Ted Russell Ford, Inc.,* 205 S.W.3d 406, 408 (Tenn.2002); *Smith v. Scott Lewis Chevrolet, Inc.,* 843 S.W.2d 9, 10 (Tenn.Ct.App.1992); *Campbell v. Teague,* 2010 WL 1240732 (Tenn.Ct.App. Mar. 31, 2010) (no Tenn. R.App. P. 11 application filed). A contingency fee arrangement, on the other hand, generally provides that a successful attorney will be paid from the proceeds of the judgment (if any) that the attorney obtains for his client. We are unaware of any TCPA cases where the trial court assessed attorney fees against a defendant based solely upon a contingency agreement, although we do not rule out the possibility that such an award may be upheld in appropriate circumstances.[25]

There is thus an inherent tension between the attorney fee provisions of the TCPA and the normal incidents of a contingency fee arrangement. We note that unlike an award of treble damages under the Tennessee Consumer Protection Act, an award of attorney fees is not meant to be punitive in nature. *Miller v. United Automax,* 166 S.W.3d 692, 697 (Tenn.2005). Rather, "the potential award of attorney's fees under the Tennessee Consumer Protection Act is intended to make prosecution of such claims economically viable to plaintiff." *Id.* (citing *Killingsworth,* 104 S.W.3d at 535).

The statutory basis for an award of fees requires that the fees be reasonable. Tenn.Code Ann. § 47–18–109(e)(1). The purpose of such an award is to make TCPA lawsuits economically viable, not to punish the defendant. Other punitive sanctions are available where warranted.

In the present case, however, we find it difficult to justify an award that requires the defendant to pay Plaintiffs' attorney

more than ten times the attorney's normal hourly rate, when the agreement between the attorney and his clients was that the attorney's fee would be taken out of Plaintiffs' recovery. By awarding over $1 million [26] to be paid by the defendant, the trial court imposed punishment on a defendant. We do not believe such a judgment serves the purposes for which the TCPA allows attorney fees to be awarded. We find that an award based upon the attorney's customary rate, which has been proved reasonable, would serve the purpose of making TCPA suits economically feasible.

We accordingly reduce the attorney fee award to the amount Mr. Matthews testified to in his affidavit: $105,300, plus his advanced costs of $20,000, for a total award of $125,300. Of course, this award in no way impairs the attorney's right to seek the remainder of his contingency fee from Plaintiffs under the terms of their contract.

## XI. PREJUDGMENT INTEREST

The trial court awarded Plaintiffs prejudgment interest at the rate of 10% per year "on the compensatory award of the Bedford County judgments in the amount of $1,000,000 and $ 1,845.75," running from the date of entry of those judgments in Bedford County.

***33** Tennessee Code Annotated § 47–14–123 gives courts and juries the authority to award prejudgment interest "in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum." TFM insists that the award of pre-judgment interest "was another blatant error by the trial court and should be reversed." The insurance company relies on the following language from *Myint v. Allstate Insurance Co.*, 970 S.W.2d at 927, to support its argument: "[t]he purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds **to which he or she was legally entitled,** not to penalize a defendant for wrongdoing." (emphasis supplied by TFM). [27]

Among the factors the court must consider in determining whether prejudgment interest is appropriate are whether the amount of the judgment upon which the interest award is based was certain or ascertainable and whether the existence of the obligation was disputed on reasonable grounds. *Hunter v. Ura,* 163 S.W.3d 686, 706 (Tenn.2005). The amount that TFM would be liable for if it were found to have acted in bad faith or in violation of the TCPA was ascertainable and certain because it was the $1 million Bedford County judgment for which its insureds were liable. Similarly, the amount of damages from the breach of contract claim was also ascertainable because of the policy limits.

However, TFM argues that it had reasonable grounds to dispute coverage. Although we have affirmed the holding that the policy provided coverage, that holding in and of itself does not mean that it was certain that TFM would be found in breach of the contract or, more significantly, in violation of the TCPA.

The uncertainty of either the existence or amount of an obligation does not necessarily mandate a denial of prejudgment interest. *See Scholz v. S.B. International, Inc.* 40 S.W.3d 78, 83 (Tenn.Ct.App.2000) (citing *Myint,* 970 S.W.2d at 928). Rather, the trial court must decide if the award of prejudgment interest is fair, given all the circumstances of the case. *Scholz,* at 83; *Hartford Underwriters Ins. Co. v. Penney,* 2010 WL 2432058, at *10 (Tenn. Ct.App. June 17, 2010) (citing *In re Estate of Ladd,* 247 S.W.3d 628, 645 (Tenn.Ct.App.2007)).

Among the factors supporting an award of prejudgment interest in this case are that Plaintiffs gave TFM fair warning that they could become subject to a substantial judgment in Bedford County, for which it intended to hold TFM liable; that it did not unreasonably delay in filing suit to recover the amount of that judgment against the insurance company once it was entered; and that TFM had full use of the money during this litigation. Ordinarily, the fact that Plaintiffs have not been compensated in any way for the loss of use of those funds during the interval between the Bedford County judgment and the Maury County judgment would be an important factor in determining fairness. *See Scholz,* 40 S.W.3d at 86; *In re Estate of Ladd,* 247 S.W.3d at 647. However, in this case Plaintiffs did not pay the Bedford County judgment against their daughter, so they never suffered the loss of use of the funds. The judgment was in favor of the Leverettes, but they were not the policyholders, and their subrogation interests cannot be greater than the Sanders' interests.

***34** An award of prejudgment interest lies within the sound discretion of the trial court. *Spencer v. A–1 Crane Service, Inc.,* 880 S.W .2d 938, 944 (Tenn.1994); *Howard G. Lewis Construction Co. v. Lee,* 830 S.W.2d 60, 66 (Tenn.Ct.App.1991); *B.F. Myers & Sons v. Evans,* 612 S.W.2d 912 (Tenn.Ct.App.1980). Such a decision will not be disturbed unless the record reveals a manifest and palpable

abuse of that discretion. *Myint,* 970 S.W.2d at 927; *In re Estate of Ladd,* 247 S.W.3d at 644.

While we may have made a different decision in the first instance, after closely reviewing the extensive record in this case, we cannot conclude that the trial court abused its discretion in awarding prejudgment interest to Plaintiffs for the interval between the Bedford County judgment and the trial court's judgment herein. That award is affirmed.

## XII. REMAINING ISSUES

Among the remaining issues raised by TFM are several that involve pre-trial decisions and are within the discretion of the trial judge .[28]

### A. Admissibility of Wendy Leverette's Testimony

TFM filed a motion *in limine* to exclude any testimony by Wendy or Jason Leverette about the accident or about the injuries suffered by Wendy Leverette. The trial court denied the motion. The insurance company contends on appeal that this was error, because it was in no way responsible for the accident or for Ms. Leverette's injuries, and because the questions before the trier of fact involved only the actions of the insurance company. TFM thus asserts that Ms. Leverette's pain and her medical bills are totally irrelevant to the question of whether it properly evaluated the coverage issue, and that the jury should not have been allowed to even consider those facts, because under Tennessee Rule of Evidence 402, "[e]vidence which is not relevant is not admissible."

The trial court explained its reason for denying TFM's motion to exclude testimony about Wendy Leverette's injuries in its order dismissing that motion:

> The court finds that such evidence is relevant to the issue of whether the defendant is or is not guilty of bad faith. It is clear to the court that one of the factors the jury may use in determining bad faith is whether the Defendant exercised ordinary care in investigating the claim and the extent of damages for which its insured could be held liable. This makes the injuries of Wendy Leverette relevant.

TFM's answer to Plaintiffs' complaint included a statement that the $1 million Bedford County judgment was "void and of no effect," and that it "was obtained either in collusion between the parties or improperly." TFM thus called into question the factual predicate for the Bedford County judgment, thereby making it necessary for the Plaintiffs to produce evidence about the injuries upon which the judgment was based.

It is well-established that "[d]ecisions regarding the admissibility of testimony and other evidence rest in the trial court's sound discretion," *Duran v. Hyundai Motor America, Inc.,* 271 S.W.3d 178, 199 (Tenn.Ct.App.2008). Such decisions are accordingly reviewed under the abuse of discretion standard. *Biscan v. Brown,* 160 S.W.3d 462, 468 (Tenn.2005). A trial court abuses its discretion when it applies an incorrect legal standard or reaches a decision which is against logic and reasoning that causes an injustice to the party complaining. *Eldridge v. Eldridge,* 42 S.W.3d 82, 85 (Tenn.2001); *Massachusetts Mutual Life Ins. Co. v. Jefferson,* 104 S.W.3d 13, 35 (Tenn.Ct.App.2002). In light of TFM's announcement of its challenge to the validity of the Bedford County judgment as well as the principles set out in prior decisions by our courts, we do not believe the trial court abused its discretion by allowing Ms. Leverette to testify or by admitting a photograph of her injury into evidence.

### B. Jury Selection

***35** TFM also appeals the trial court's grant of Plaintiffs' motion to exclude the insurance company's policyholders from the jury pool. The record shows that Plaintiffs initially filed a very broad motion to exclude from the pool of jurors virtually any person with a possible connection to TFM. Plaintiffs noted that Tenn.Code Ann. § 22–1–104 prohibits any party from acting in a case in which that person is interested and that TFM is a mutual insurance company which gives all policyholders a right to vote and a theoretical share in the company. Plaintiffs reasoned that TFM's policyholders were interested because "they had a stake in the company and could be adversely affected by the verdict." TFM filed a response in opposition to Plaintiffs' motion, and Plaintiffs subsequently amended their motion to seek the exclusion of only those potential jurors who were currently employed by or insured by TFM. The trial court granted the motion.

TFM asked the trial court to reconsider its decision, providing the affidavit of Ed Lancaster, the Secretary and General Counsel for Tennessee Farmers Mutual Insurance Companies. Mr. Lancaster swore that TFM's policyholders

would not be affected by the outcome of the case, and that because TFM held ample surplus funds, there was no danger that their premiums would increase or decrease, regardless of the verdict. The trial court denied TFM's motion to reconsider.

It is a basic principle of the jury system that a litigant is entitled to a jury composed of persons free from bias or prejudice. *Wolf v. Sundquist,* 955 S.W.2d 626, 629 (Tenn.Ct.App.1997). TFM argues on appeal, however, that rather than exclude a broad swath of the population from serving on the jury, the trial court should have allowed the parties to use the process of *voir dire* to determine on an individual basis whether any potential juror would be biased because of its status as a TFM policyholder. The insurance company has directed our attention to several cases that stand for the proposition that membership in a particular group does not automatically raise an implication of bias in a potential juror.

First, TFM cites *Nelson v. State,* 292 S.W.2d 727 (Tenn.1956), which involved criminal vandalism related to a strike by telephone company employees. Our Supreme Court ruled in that case that the trial court erred in excluding all union members from the jury venire, because the "court's ruling is too broad." *Nelson v. State,* 292 S.W.2d at 731. Presumably, the exclusion of only those who were members of the telephone workers union would have passed muster.

Other Tennessee cases cited by TFM involve challenges to verdicts in criminal cases based on belated discovery of the affiliations of individual jurors. *State v. Pender,* 687 S.W.2d 714 (Tenn.Crim.App.1984) (juror in rape trial was part-time police officer); *State v. Mason,* 623 S.W.2d 126 (Tenn.Crim.App.1981) (juror in rape trial had formerly belonged to K.K.K.). At most, these cases only suggest that if it had decided to do so, the trial court could have denied the motion to exclude TFM's policyholders and allowed some of them to become members of the jury without thereby creating a biased panel.

***36** Of course, the systematic exclusion from juries of any readily identifiable racial, religious, political group, or suspect class, is prohibited on constitutional grounds. *J.E.B. v. Alabama,* 511 U.S. 127 (1994) (jurors may not be stricken solely on the basis of gender); *Batson v. Kentucky,* 476 U.S. 79 (1986) (use of peremptory challenges to strike jurors on racial grounds forbidden); *Hernandez v. Texas,* 347 U.S. 475 (1954) (persons of Mexican descent could not be excluded from jury service); *Woodson v. Porter Brown Limestone Co., Inc.,* 916 S.W.2d 896, 902 (Tenn.1996) ("Racially-based juror exclusions affect and injure the integrity of the justice system.") Nothing like that has been alleged in the present case.

Another jury selection principle is that "[p]arties are constitutionally entitled to a venire which represents a fair cross-section of the community." *Woods v. Herman Walldorf & Co., Inc.,* 26 S.W.3d 868, 875 (Tenn.Ct.App.1999). TFM has presented no proof, however, that its policyholders are distinct from the general community in any way other than their choice of insurer. *See State v. Hester,* 324 S.W.3d 1, 40 (Tenn.2010) ("Not all purposeful exclusion of individuals sharing a common trait is inherently unconstitutional or improper."). Thus, while a blanket exclusion of all TFM policyholders from the jury might not be the best or the only way to avoid empaneling jurors who could be biased in favor of the company, TFM has offered no theory as to why a jury from which its policyholders are absent would be biased against them.

There are also no indications in the record to suggest that the jury that was ultimately empaneled to hear the case against TFM was not composed of fair and impartial jurors. TFM therefore cannot claim that it was denied a fair trial before an unbiased jury. Further, absent statutory or constitutional violations, decisions about jury selection remain within the sound discretion of the trial judge. *State v. Hugueley,* 185 S.W.3d 356, 378 (Tenn.2006); *State v. Elrod,* 721 S.W.2d 820, 822 (Tenn.Crim.App.1986).

The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Myint v. Allstate Ins. Co.,* 970 S.W.2d 920, 927 (Tenn.1998). Further, under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to propriety of the decision made." *Eldridge,* 42 S.W.3d at 85 (citing *State v. Scott,* 33 S.W.3d 746, 752 (Tenn.2000)). The trial court acted within its discretion in limiting the jury pool.

**C. Amendment of Scheduling Order**

Another issue raised by TFM was the trial court's refusal to amend its scheduling order to allow the insurance company to present the testimony of Russell Reviere, the insurance company's expert witness, to the jury. The scheduling order filed on February 12, 2010, set trial dates of September 1, 2 and 3, 2010, as well as dates for important preliminary steps to be accomplished before trial. The dates that are relevant to

this issue were as follows: Plaintiffs were required to disclose their expert witnesses by April 30, 2010. Defendants were required to disclose their expert witnesses by June 4, 2010. Discovery depositions of all expert witnesses were required to be completed by July 2, 2010.

***37** In response to interrogatories, Plaintiffs disclosed the identity of their two expert witnesses, John Moyer and Ronald Freemon, on March 22, 2010, more than thirty days before their deadline. Their disclosure included extensive details as to the experts' qualifications, the matters about which they were expected to testify, and the gist of their opinions on those matters. TFM identified its expert, Scott Walls, on June 4, 2010, the very last possible day for it to do so under the scheduling order. TFM took the deposition of John Moyer on June 15, 2010. After reviewing the testimony of Mr. Moyer, TFM asked its attorney to seek an expert to address his testimony, and he contacted attorney Russell Reviere, who agreed to assume that role.

On August 17, 2010, two weeks before trial, TFM filed a motion to amend the scheduling order to allow it to "present and produce at trial an expert witness previously undisclosed." Attached to the motion was a statement prepared by Mr. Reviere, together with his Curriculum Vitae. The trial court denied the motion in an order dated August 20, 2010. The court stated that TFM had failed to show any excusable neglect for its failure to comply with the scheduling order, and it found that the shortness of the time before trial would place an "unnecessary and undue burden" upon Plaintiffs to prepare for Mr. Reviere's testimony.

The standards for the exercise of the trial court's authority in such matters is set out in Tenn. R. Civ. P. 6.02, which reads in relevant part,

> Enlargement—When by statute or by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, ... (2) upon motion made after the expiration of the specified period permit the act to be done, where the failure to act was a result of excusable neglect

As the above rule indicates, a trial court's decision on a motion to amend a scheduling order is within its discretion. Such a decision is therefore reviewed under the abuse of discretion standard. *See Williams v. Baptist Memorial Hospital,* 193 S.W.3d 545, 551 (Tenn.2006). Our Supreme Court has also stated that where an enlargement of time is requested after the original time has elapsed, Rule 6.02(2) requires the party requesting the enlargement to show that its failure was due to excusable neglect and that the opposing party has not been prejudiced by the delay. *See Douglas v. Estate of Robertson,* 876 S.W.2d 95, 97 (Tenn.1994).

TFM argues that the trial court abused its discretion by not allowing it to present the testimony of Mr. Reviere, that the late filing of its motion to amend the scheduling order was due to excusable neglect, and that Plaintiffs would not have been prejudiced if the trial court had granted its motion. TFM discusses the sequence of events that led to its delay in presenting Mr. Reviere as an expert witness, but it is not clear why its neglect should be considered excusable.

***38** TFM complains that the deadline for disclosing its expert witnesses had already passed when it took the deposition of John Moyer, but it does not explain what prevented it from taking his deposition earlier. It also does not explain why it decided that the testimony of Scott Walls, the individual previously identified as the insurance company's expert, would not be adequate. TFM states, however, that it identified Mr. Walls as its expert out of an abundance of caution, and it argues that he cannot be considered an independent expert under Tenn. R. Civ. P. 26.02(4)(A) because he is an employee of the defendant insurance company.

TFM cites several cases that make a distinction between an independent expert under Tenn. R. Civ. P. 26.02(4)(A) and a witness whose expertise arises from employment by a party. *See White v. Vanderbilt University,* 21 S.W.3d 215, 224 (Tenn.Ct.App.1999) and *Heath v. Memphis Radiological Professional,* 79 S.W.3d 550, 559 (Tenn.Ct.App.2001). The insurance company does not explain, however, how that distinction relates to the question of excusable neglect in the present case, nor how it has been disadvantaged by its own decision to name Mr. Walls as an expert witness. Clearly, TFM could have chosen to retain an independent expert prior to the deadline if it had wished to do so.

At the conclusion of Mr. Reviere's testimony, TFM renewed its motion that he be allowed to testify before the jury.[29] That motion was denied.

We have examined the deposition of Scott Walls and the statement of Russell Reviere that was attached to TFM's motion to amend the schedule. Both individuals stated that in their opinion the decision to exclude Claire Sanders from coverage was correct, and that the insurance company carried out its investigation of the accident and reached its decision in good faith. Russell Reviere offered a specific explanation as to why he did not believe the insurance company had acted in bad faith, while Scott Walls only indirectly addressed that question. We note, however, that TFM was well aware that Plaintiffs' claim of bad faith against the insurance company was an integral part of their Complaint. So the insurance company can hardly complain that John Moyer's testimony on that issue amounted to some kind of unfair ambush.

We hold that the trial court acted well within its discretion in denying TFM's motion to amend the scheduling order.

## XIII. CONCLUSION

We affirm the judgment finding TFM liable for breach of contract and the award of damages for that breach, which was $50,000 and $12,000 (policy limits for personal injury and property damage) to the Sanders, parent and guardians of Claire, and Leverettes; and $5,000 (medical payments) to the Sanders, in their individual capacity.

We reverse the judgment based on the tort of bad faith. Accordingly, we vacate the compensatory damages, $1.2 million, and punitive damages, $500,000, based on the bad faith claim.

We affirm the verdict and judgment holding that TFM had committed unfair or deceptive act or practice under TCPA causing damages to Sanders. The trial court's award of $1,000,000 in compensatory damages is affirmed. The trial court held that the breach of contract damages were subsumed within the $1,000,000 judgment, and we agree. The trial court correctly denied $200,000 in damages that had been awarded to the Sanders by the jury because they represented emotional distress damages, which are not "actual damages" as allowed by the TCPA.

***39** We reversed the trial court's award of trebled damages under the TCPA, and must vacate that award. In calculating the trebled damages, the trial court stated that the damages to be trebled were $6100, for economic losses to the Sanders individually, and $1,001,845 for the Sanders in their capacity as parents and representatives of Claire.

We affirmed the award of prejudgment interest from the date of the Bedford County judgment through the judgment of the trial court in the case under appeal, at the rate of 10% per year. We modified the award of attorney fees and costs advanced by the attorney to $125,300.[30]

Costs are taxed to the Defendant, Tennessee Farmers Mutual Insurance Company for which execution may issue if necessary.

RICHARD H. DINKINS, J., concurring in part, dissenting in part.

RICHARD H. DINKINS, J., concurring in part and dissenting in part.

I agree with the majority's analysis of the coverage issue in Section V and its conclusion that TFM breached the contract by denying coverage. As a result of this breach, the judgment against TFM in the amount of $67,000 was appropriate. I concur as well with the analysis of the bad faith claims in Section VI.

While I agree that there was evidence to support the determinations that the conduct of TFM with respect to the Sanders' claim violated Tenn.Code Ann. § 56–8–108 and that such violations would support a finding of liability under the Tennessee Consumer Protection Act, I respectfully dissent from majority's affirmance of the jury's award of $1.2 million as compensatory damages (as modified by the trial court to $1 million) for the violation. I do not believe, under the unique facts and circumstances of this case, that the $1 million default judgment entered against Claire Sanders in the Bedford County litigation brought by the Leverettes was "as ascertainable loss of money or property" within the meaning of Tenn.Code Ann. § 47–18–109(a)(1).

Footnotes

1 TFM's claims file, which is part of the appellate record, also contains an exchange of correspondence between USAA (the Leverettes' insurance company) and TFM's claims adjuster Frank Smith. USAA stated that it was reimbursing its insured for damages, but that its investigation showed that TFM's insured was responsible and that it intended to recover the amount it paid. It also stated that its own investigation showed that Beth Neeley gave Claire Sanders permission to drive, and it asked TFM for an explanation of its decision to deny coverage and for a copy of the insurance policy. Mr. Smith responded that the coverage decision was TFM's alone to make, and that it would provide USAA "with a simple 'yes' or 'no' whether or not our insured violated the terms of her policy, after a complete investigation."

2 The Sanders' appearance before the court was an essential requirement for the entry of a default judgment, for Tenn. R. Civ. P. 55.01 provides among other things that "No judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein."

3 TFM filed a motion under Tenn. R. Civ. P. 9 for permission to seek an interlocutory appeal of the trial court's order of partial summary judgment, which was denied. The insurance company then filed a motion in this court under Tenn. R. Civ. P. 10 for extraordinary appeal, which was likewise denied.

4 The trial court had instructed the jury that Plaintiffs would not be allowed to collect damages under both bad faith and the TCPA claims, but would have to make an election of remedies.

5 The jury had awarded the Sanders $1.2 million in compensatory damages in their individual capacities and awarded zero to the Sanders "as parents and guardians of Julia Claire Sanders." In response to a motion by Plaintiffs, the trial court reallocated the damages. This "reallocation" is challenged on appeal by TFM and is the subject of another section of this opinion.

6 The Wisconsin court reached a different result than did the court in this case, affirming the summary judgment for the insurance company because the only possible permission the minor driver in that case obtained came from a friend who had no right to drive or possess the car himself.

7 As discussed later in this opinion, it appears to us that Plaintiffs intended that we consider the provisions of the Act as providing specific legislative examples of unfair and deceptive practices in the context of the TCPA claim.

8 The court likened this language to the "exclusive remedy" language in the Workers' Compensation laws.

9 Plaintiffs also refer us to *MFA Mutual Ins. Co. v. Flint,* 574 S.W.2d 718 (Tenn.1978), and describe this case as a "first party case brought directly by the insured against the insurer." The plaintiff *Chandler* similarly argued that the Tennessee Supreme Court had recognized the tort of bad faith in *Flint.* The *Chandler* court disagreed with that interpretation, *Chandler,* 715 S.W.2d at 621, and we agree with the *Chandler* interpretation. In *Flint,* the plaintiff brought an action to rescind or reform releases he had signed with the insurance company on the ground that the settlement and releases were obtained in bad faith and in breach of the insurer's fiduciary duty to the insured. *Id.* The Chandler found *Flint* inapplicable to the request that it recognize the tort, stating "*Flint* was a contract action. It sought a contractual type of relief, rescission of releases for fraudulent inducement and acts of bad faith on the part of the insurer." *Chandler,* 715 S.W.2d at 621. The *Chandler* court noted that the Supreme Court had not stated that it was acknowledging the tort of bad faith.

10 Plaintiffs requested that we "clear up the inconsistency among *Chandler, Johnson,* [and] *Myint* ...."

11 The jury made this award to the Sanders in their individual capacity. The trial court reallocated the damages, and that action is the subject of a separate issue raised by TFM discussed later in this opinion.

12 This catch-all provision was amended in 2011, effective October 1, 2011, to add the following at the end of the provision, "provided, however, that enforcement of this subdivision (b)(27) is vested exclusively in the office of the attorney general and reporter and the director of the division." Tenn. Pub. Acts 2011, ch. 510, §§ 15, 19.

13 The court went on to find there was no substantial and material evidence anywhere in the record to support a verdict for Plaintiff pursuant to the TCPA. Its decision, however, was essentially a holding that no conduct shown met the requirements of an unfair or deceptive practice.

14 The jury was asked, "[w]as the Defendant's unfair or deceptive act or practice committed willfully or knowingly?" and answered in the affirmative. On appeal, TFM argues that it was error to submit that issue to the jury, since the statute, Tenn.Code Ann. § 47–18–109(3), requires that the "court" make that determination. Plaintiffs argue that TFM did not lodge any objections to the jury instructions or the jury verdict form in relation to their TCPA claims and, therefore, should not be permitted to raise this issue for the first time on appeal. They ask us to rule that any such objection has been waived. *See Dye v.. Witco Corp.,* 216 S.W.3d 317, 321 (holding that issues raised for the first time on appeal are waived). We need not make that determination, however, because, as Plaintiffs point out, even if the trial court erred in submitting the question to the jury, the court remedied that error by making its own determination on the issue. The court's judgment on treble damages explicitly declares that, "[t]he court, having heard and independently weighed the evidence agrees with the jury's finding that the Defendant committed unfair and deceptive practices in

violation of the TCPA, and did so willfully and knowingly." Since the court made it clear that it performed its independent statutory duty to determine that question, any error was harmless at most.

15 Once an ascertainable loss has been established, the TCPA allows consumers to recover "actual damages," Tenn.Code Ann. § 47–18–109(a)(1). The trial court applied treble damages to $5,000 of the medical costs the Sanders had to incur for their daughter's injuries, and the attorney fees of $1,100 they expended after TFM refused to defend their case in the Bedford County action. The resulting award to the Sanders in their individual capacity amounted to $18,300. The court also held that the Sanders were entitled to a treble damages award as parents and guardians of Julia Claire Sanders for her economic damages of $1,001,845, resulting in a total award to them in that capacity of $3,005,535.

16 Among those was the following: "[a]dmit that Tennessee Farmers Mutual was found to have committed bad faith towards its insured in the following court cases," which statement was followed by a list of six cases. The insurance company's answer was, "[t]his Defendant neither admits nor denies the request, and states that the published opinions speak for themselves." The cases were then admitted into evidence, over the objections of TFM. It is unclear whether the jury read or considered those cases during their deliberations. TFM argues on appeal that the opinions should not have been admitted into evidence, and, maybe, that the jury should not have heard about the prior bad faith judgments. Because we have vacated the punitive damages holding on bad faith, and because we are reviewing only the trial court's decision on treble damages, we find it unnecessary to resolve this evidentiary issue.

17 TFM notes that Tennessee is not a direct action state, which means that in Tennessee an injured plaintiff cannot directly sue the liability insurance carrier of the defendant who allegedly caused her injury. *Seymour v. Sierra,* 98 S.W.3d 164, 165 (Tenn.Ct.App.2002). But Tennessee, like many states, has allowed injured parties to file suit against insurance companies that have refused to honor the terms of their policies after judgment has been rendered against an insured tortfeasor. *See Ferguson v. Nationwide Property & Cas. Ins. Co.,* 218 S.W.3d 42 (Tenn.Ct.App.2006); *Franklin v. St. Paul Fire & Marine Ins. Co.,* 534 S.W.2d 661 (Tenn.Ct.App.1975) (injured party deemed to be third party beneficiary of insurance policy).

18 If the Sanders are proper plaintiffs, we fail to see how the inclusion of the Leverettes as parties affects the judgment or prejudices TFM.

19 After judgment was entered, TFM renewed its motion for directed verdict or for a new trial, accompanied by the affidavit of juror John Russell, which was apparently offered for the purpose of demonstrating the jury's intention in regard to the allocation of damages. Mr. Russell stated, "[a] fter hearing the proof, it was our specific and unanimous intent to award Julia Claire Sanders, the thirteen (13) year old tortfeasor whose negligence began this whole ordeal, no recovery whatsoever. All jurors agreed that she was not entitled to any recovery. We specifically crafted our verdict to ensure that Julia Claire Sanders would not recover any amount in damages." Plaintiffs argue that this affidavit was inadmissible under Rule 606(b) of the Tennessee Rules of Evidence, and should not be considered by this court.

20 In addition to the $1 million verdict, the court's order included $1,845.75, representing costs and attorney fees incurred by the Sanders because of TFM's refusal to defend them against the claim filed in Bedford County.

21 The entire verdict in this case was returned in response to a single set of specific interrogatories, so it is unclear if and how a line may be drawn between a general and a specific verdict. We believe that under the circumstances of this case, the trial court acted within its authority in reallocating the damages as it did.

22 Rule 8, RPC 1.5 reads:

> A lawyer shall not make an agreement for, charge or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered as guides in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) The fee customarily charged in the locality for similar legal services;
>
> (4) The amount involved and the results obtained;
>
> (5) The time limitations imposed by the client or by the circumstances;
>
> (6) The nature and length of the professional relationship with the client;
>
> (7) The experience, reputation, and ability of the lawyer or lawyers performing the services;
>
> (8) Whether the fee is fixed or contingent;
>
> (9) prior advertisements or statements by the lawyer with respect to the fees the lawyer charges; and
>
> (10) whether the fee agreement is in writing.

23 The court also awarded the Sanders discretionary costs in the amount of $11,040.25.

24 TFM argues, once again, that Plaintiffs did not suffer any legally cognizable injury, that the trial court erred by granting Plaintiffs summary judgment on the question of coverage, that it was not guilty of bad faith in any case, and that the trial court did not have the

authority to modify the jury verdict. We have already dealt with those issues in detail. TFM repeats the same arguments, essentially that since the coverage decision was wrong, everything else must be reversed, on almost every issue it raises.

25 However, in *Adkinson v. Harpeth Ford–Mercury, Inc.*, 1991 WL 17177 (Tenn.Ct.App. Feb. 15, 1991), this court affirmed an attorney fee award of $20,004, which was more than the plaintiff's attorney would have received under his contingency fee contract.

26 Of course, since we have vacated the treble damage award and the punitive damage award, applying the percentage would result in a smaller amount to be awarded to the attorney even if we approved the methodology used by the trial court.

27 TFM then reiterates all its earlier arguments that the judgments against it were invalid, and thus that the plaintiffs were not legally entitled to any funds upon which a prejudgment interest award could be assessed.

28 Some other issues are pretermitted by our holdings in this opinion.

29 TFM called Russell Reviere to testify out of the presence of the jury for an offer of proof. Mr. Reviere testified that his thirty year law practice had focused almost 100 percent on the area of insurance defense. He stated that he had familiarized himself with all the evidence in this case, and that in his opinion, Beth Neeley was never in lawful possession of her mother's car, because she did not have a license and, thus, could not lawfully operate it on the roads in the state of Tennessee. He concluded, therefore, that she could not have given Claire Sanders valid permission to drive it. Asked if he thought the phrase "lawful possession" was open to different interpretations, he stated that in his opinion it was not: "To me, 'lawful' is a lot like pregnant, it is either one or the other. It's either lawful or unlawful." Mr. Reviere also testified that in his opinion Frank Smith had conducted his investigation in good faith. He was asked if Mr. Smith should have taken a statement from Beth Neeley as part of that investigation. He stated that "in a perfect world I would never argue with taking statements from anyone at anytime," but that since in his opinion Beth Neeley was not in lawful possession of the automobile, her statement would not have added anything of value to the investigation.

30 It is not clear whether a discretionary cost award was made and/or is challenged in this appeal.

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1996 WL 735234
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Richard McCONKEY and wife Tammie McCONKEY Plaintiffs-Appellants

v.

Beatrice H. LANEY Defendant-Appellee

No. 03A01-9608-CV-00250. | Dec. 24, 1996.

**Attorneys and Law Firms**

VAN R. MICHAEL, WITH MICHAEL & MICHAEL, OF SWEETWATER, TENNESSEE, FOR APPELLANT

DAVID F. HARROD, WITH CARTER, HARROD & CUNNINGHAM, OF ATHENS, TENNESSEE, FOR APPELLEE

**Opinion**

**OPINION**

SANDERS, Sp. J.

*1 The Plaintiffs appeal from a jury verdict awarding them damages in their suit for personal injuries. They insist the award of the jury was inadequate to compensate them for the injuries sustained. We affirm.

On January 23, 1993, the Plaintiff-Appellant, Tammie McConkey, was operating her automobile in a westerly direction on State Highway 39 in Monroe County near its intersection with Gamble Gap Road. At the same time, Defendant-Appellee Beatrice Laney was operating her automobile in a southerly direction on Gamble Gap Road near its intersection with State Highway 39. There was a stop sign on Gamble Gap Road requiring drivers of vehicles on Gamble Gap Road to stop before entering onto Highway 39. Highway 39 makes a sharp curve as it approaches the intersection with Gamble Gap Road, limiting the visual distance for drivers on Gamble Gap Road. Defendant Laney stopped her car at the intersection. Not seeing Plaintiff's, Mrs. McConkey's, automobile approaching the intersection, Ms. Laney pulled out onto Gamble Gap Road in front of Mrs. McConkey's car and was making a left turn when the two cars collided. There were no apparent serious injuries to either party but they were both taken by ambulance to Woods Memorial Hospital in Etowah, where they were both treated for their injuries and released.

Plaintiff McConkey filed suit against Defendant Laney for personal injuries. She alleged the Defendant was guilty of both statutory and common law negligence which was the proximate cause of her injuries. Plaintiff alleged she had incurred approximately $2,300 in medical expenses as a result of her injuries, her earning capacity had been substantially reduced, and she had sustained permanent injuries. She asked for damages in the amount of $100,000 and demanded a jury to try the cause. Her husband, Plaintiff Richard McConkey, joined in the complaint, asking for $10,000 for the loss of consortium.

The Defendant, for answer, denied she was guilty of acts of negligence which were the proximate cause of Plaintiff's injuries or that she was liable for any damages.

Upon the trial of the case, the proof showed the Plaintiff was unemployed and had suffered no loss of income as a result of her injuries.

Defendant moved for a directed verdict as to the husband's claim for damages for loss of consortium, which was granted by the court.

The Defendant conceded she was responsible for the accident.

The court directed a verdict as to liability and the case was submitted to the jury on the question of the damages for Mrs. McConkey. The jury returned a verdict in favor of Mrs. McConkey for $872.70.

The Plaintiffs' motion for a new trial, or in the alternative an additur, was overruled and they have appealed.

Although both Plaintiffs have appealed, Mr. McConkey presents no issue relating to the trial court's directing a verdict on his claim for loss of consortium.

The thrust of the issues presented for review are: (a) The verdict of the jury in awarding damages was contradictory to the evidence; and (b) Counsel for the Defendant made an inappropriate argument to the jury in saying the chiropractic physician who treated the Plaintiff had not taken X rays of her

neck when the proof showed such X rays had, in fact, been taken.

*2 We find no error by the trial court, and affirm for the reasons hereinafter stated.

The verdict of the jury was sufficient to cover all of Mrs. McConkey's medical expenses resulting from the accident except approximately $3,300 she had incurred as a result of some 92 visits she had voluntarily made to her chiropractic physician, Dr. Price, between the date of the accident in January, 1993, and the date of trial in November, 1995. The proof showed Mrs. McConkey had been a patient of Dr. Price's for some time prior to the accident and he had been treating her for the same complaints he treated her for after the accident.

It has been pointed out in numerous cases that the amount of the verdict in a personal injury case is primarily for the jury to determine and, next to the jury, the most competent person to pass upon the matter is the judge who presided at the trial and heard the evidence. *Reeves v. Catignani,* 157 Tenn. 173, 7 S.W.2d 38 (1928). When the trial judge denies a request for an additur and approves the verdict in his or her role as "thirteenth juror," we must affirm if there is any material evidence to support the verdict. *Coffey v. Fayette Tubular Products,* 929 S.W.2d 326, 331 (Tenn.1996).

In the case of *Campbell v. Campbell,* 29 Tenn.App. 651, 199 S.W.2d 931, the court said:

> "The amount of damages is primarily a question for the jury, and their verdict, approved by the trial judge, is entitled to great weight in this court, if there is no claim of corruption or dishonesty. *Phillips v. Newport,* 28 Tenn.App. 187, 187 S.W.2d 965."

In the case of *Karas v. Thorne,* 531 S.W.2d 315 (Tenn.App.1975) this court held "there is no fixed rule in this state that the amount of damages awarded in a personal lawsuit must equal or exceed the proven medical expenses incurred." *Id.* 316.

The Appellant's second issue is that the Defendant's counsel inappropriately argued to the jury that Dr. Price, the chiropractic physician who treated the Plaintiff and testified in her behalf, had not taken X rays of her neck and this argument adversely affected the jury's verdict. Appellant says she objected to this argument and the court was in error in not sustaining her objection.

Appellant fails to cite us to the record where such objection and the ruling of the court were made, *See* Rule 6(1) Rules of the Court of Appeals. Nor do we find such objection in the record before us. Any objection to the remarks or conduct of counsel must be made at trial and a ruling had thereon, or it will not be considered on appeal. *See Morgan v. Duffy,* 94 Tenn. 686, 30 S.W. 735 (1895). Since Appellant's counsel made no objection at the time of the argument and since he did not request the trial judge to instruct the jury to disregard the argument, we find no error in counsel's remarks. *See Miller v. Alman Construction Co.,* 666 S.W.2d 466, 469 (Tenn.App.1983).

Appellants insist the record shows Dr. Price did make X rays of Plaintiff's neck. In support of her argument, her counsel relies upon the following testimony of Dr. Price:

*3 "A. I saw Ms. McConkey as of January the 25th, of '93 following a motor vehicle accident.

"Q. Did you examine her on that occasion?

"A. Yes, I did.

"Q. And what did your examination reveal?

"A. Examination of x-rays [sic] from the hospital, Woods Hospital, *and the x-rays* [sic], it showed a flexion malposition of C5, which in terminology means the neck had been slung forward with one of the vertebrae going in that position and not returning back to its normal position compared to the one above and the one below." (Emphasis ours.)

The record shows the X rays from Woods Hospital were made the night of the accident. None of the X rays taken at the hospital, however, were of Mrs. McConkey's neck.

Dr. Price did not testify he took any X rays of Mrs. McConkey's neck after the accident. Appellant argues that the statement "and the x-rays" mentioned in the testimony quoted above refers to X rays Dr. Price did make after the accident. Appellant also argues that the following written notation on Dr. Price's "Invoice for Services" filed as an exhibit to his deposition, supports her contention that such X rays were made: "1-26-93 ... Taking A.P.LAX Cervical x-rays [sic] not in Woods file". Although this written statement appears

on the "Invoice for Services," there is no other supportive evidence for the statement in the record nor does the record show this document was introduced into evidence on the trial of the case.

It is a recognized rule in this jurisdiction that the trial court, in its sound discretion, shall determine what is proper argument in a particular case and the appellate courts will not review the action of the trial court except for palpable abuse of that discretion, nor can error be predicated on the failure of the court to give an instruction to the jury which was not requested.

In the case of *J. Avery Bryan, Inc., v. Hubbard,* 32 Tenn.App. 648, 1949, 225 S.W.2d 282 (1949) the court said:

> In general, control over the argument of counsel is lodged with the trial court which exercises a sound judicial discretion as to what shall and shall not be permitted in argument. *Ferguson v. Moore,* 98 Tenn. 342, 39 S.W. 341; *Kizer v. State,* 80 Tenn. 564; *East Tennessee, V. & G.R. Co. v. Gurley,* 80 Tenn. 46; *Stone v. O'Neal,* 19 Tenn.App. 512, 90 S.W.2d 548.

In the case of *Klein v. Elliott,* 59 Tenn.App. 1 (1968), 436 S.W.2d 867, the court said:

> The allowance or denial of mistrial (new trial) on grounds of misconduct of counsel is discretionary with the trial judge, and that discretion will be reviewed only in exceptional cases. *Prewitt-Spurr Mfg. Co. v. Woodall,* 115 Tenn. 605, 90 S.W. 623 (1905). In view of the harmless error statute, T.C.A. Sec. 27-117, and the lack of showing that the misconduct actually affected the outcome of the trial, there can be no reversal on this ground.

In the case of *Jenkins v. Perry,* 52 Tenn.App. 576 (1964), 376 S.W.2d 726, the court said:

> ***4** It should be pointed out that the trial Judge has considerable discretion in a matter of this kind and that the Appellate Courts will not review such action except for palpable abuse of this discretion. *Crews v. Gould,* 6 Tenn.Civ.App. 620. And if the trial Judge failed to instruct the jury on such a point it was the duty of counsel to call this to his attention by special request. *Crews v. Gould, supra.* Error cannot be predicated on the failure of the Court to give an instruction which was not asked for. *Bridges v. Vick,* 21 Tenn. 516; *Womac v. Casteel,* 200 Tenn. 588, 292 S.W.2d 782 and *Howell v. Accident & Cas. Ins. Co.,* 32 Tenn.App. 83, 221 S.W.2d 901.

We find no abuse of discretion in the court's allowing the argument even if a timely objection were made.

The issues are found in favor of the Appellee. The judgment of the trial court is affirmed and the cost of this appeal is taxed to the Appellants. The case is remanded to the trial court for any further, necessary proceedings.

GODDARD, P.J., and SUSANO, Jr., J., concur.

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2004 WL 343951
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Dominic P. PELLICANO
v.
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY.

No. M2003-00292-COA-R3-CV. | Jan. 7, 2004 Session. | Feb. 23, 2004. | Application for Permission to Appeal Denied by Supreme CourtOct. 4, 2004.

Appeal from the Circuit Court for Davidson County, No. 00C-3678; Carol Solomon, Judge.

**Attorneys and Law Firms**

Lora A. Barkenbus, Nashville, Tennessee, for the appellant, Metropolitan Government of Nashville and Davidson County.

Robert H. Plummer, Jr., Franklin, Tennessee, for the appellee, Dominic P. Pellicano.

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and PATRICIA J. COTTRELL, J., joined.

**Opinion**

## OPINION

FRANK G. CLEMENT, JR., J.

***1** Plaintiff, who had a pre-existing herniated disk, was rear-ended in a vehicular accident seven weeks after the first injury. A diskectomy was performed six months later. Treating physician equivocated when asked whether the diskectomy was necessitated by the second injury, testifying, "maybe yes; maybe no." Trial court found that Plaintiff's need for surgery was caused by incident and awarded Plaintiff judgment against Defendant for all medical expenses related to the surgery, lost wages and pain and suffering. Plaintiff did not present sufficient proof to establish that incident was cause in fact of need for surgery for physician could not state with reasonable degree of medical certainty that need for surgery was the result of the incident. Further, lay testimony of Plaintiff and Plaintiff's brother was insufficient to prove cause in fact of Plaintiff's need for surgery. Accordingly, we reverse the trial court.

The issue is whether the plaintiff, who suffered from a pre-existing herniated disk, presented sufficient proof to establish that the incident with the defendant's ambulance was the cause in fact for surgery to repair the herniated disk and 100% of the resulting medical expenses, lost wages and pain and suffering.

Plaintiff/Appellee, Dominic Pellicano (Pellicano) was involved in an on-the-job accident on November 2, 1999 while working for A-H Mechanical Contractors, Inc., when a one hundred pound pipe fell on his neck and shoulder. Pellicano sought medical care, and X-rays were taken which revealed a herniated disk. Pellicano filed a workers' compensation claim and alleged that he sustained the herniated disk as a result of the November 2, 1999 on-the-job injury. His employer and workers' compensation carrier contested the claim . [1]

Seven weeks later, on December 27, 1999, Pellicano was involved in a "rear-end" incident in which his vehicle was struck from behind by a Nashville Fire Department ambulance. The ambulance was driven by William Jones. Ricky Wilson, a paramedic, was in the rear of the ambulance treating two patients. The ambulance was moving slowly in bumper-to-bumper traffic, at approximately five (5) miles per hour. Jones attempted to stop the ambulance slowly so as not to throw the patients and Wilson around in the back of the ambulance; however, he was unable to stop before hitting Pellicano's vehicle from the rear. Wilson, who was standing in the rear of the ambulance when the wreck occurred, testified that the incident was so subtle that he was not knocked off his feet. Jones and Wilson spoke to Pellicano immediately after the accident. Pellicano stated to them that he was not hurt and did not need nor desire medical care. No one in the ambulance sustained any injuries as a result of the incident.

Following the incident at issue, Pellicano continued to work and did not seek medical care until four months later. Pellicano first sought medical care for injuries related to the rear-end incident on May 4, 2000; however, he did not return to the doctor who treated him for the on-the-job injury. Instead, Pellicano went to Dr. John P. Guillermin. Following a brief period of conservative treatment, Dr. Guillermin recommended surgery to repair Pellicano's herniated disk.

The surgery was performed on June 19, 2000. After surgery, Pellicano remained off work until September 18, 2000 when he was released to return to work. Pellicano has not received any medical treatment since the surgery.

*2 Pellicano filed this personal injury action against the Metropolitan Government of Nashville and Davidson County, Tennessee (Defendant), the Nashville Fire Department and William R. Jones, the ambulance driver. By agreed order, William Jones and the Nashville Fire Department were dismissed from the lawsuit.

The case was tried without a jury. Witnesses at trial included Pellicano; his brother, Peter Pellicano; the ambulance driver, William Jones; and the other paramedic in the ambulance, Ricky Wilson. The testimony of Dr. Guillermin, Pellicano's treating physician, was presented through his deposition. [2]

The trial court held that Pellicano's pre-existing neck injury was exacerbated by the incident and that the incident was the sole cause in fact for Pellicano's need for a diskectomy. Defendant was held liable for 100% of the medical expenses related to the surgery, plus lost wages and pain and suffering. Specifically, Pellicano was awarded $41,580 for medical bills, $5,500 for lost wages and $45,000 for pain and suffering for a total award of $92,080. The trial court did not allocate any of Pellicano's damages to the pre-existing injury or to Pellicano's employer.

**Standard of Review**

An appellate court's review of a trial court's findings of fact is *de novo* upon the record of the trial court accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. R.App. P. 13(d). Unless there is an error of law, we must affirm the trial court's decision as long as the evidence does not preponderate against the findings. *Umstot v. Umstot,* 968 S.W.2d 819, 821 (Tenn.Ct.App.1997).

The weight, faith and credit to be given to a witness' testimony lies with the trial judge in a non-jury case because the trial judge had an opportunity to observe the manner and demeanor of the witness during their testimony. *Roberts v. Roberts,* 827 S.W.2d 788, 795 (Tenn.Ct.App.1991); *Weaver v. Nelms,* 750 S.W.2d 158, 160 (Tenn.Ct.App.1987). In reviewing documentary proof such as deposition testimony which was presented to the trial court, "all impressions of weight and credibility are drawn from the contents of the evidence, and not from the appearance of witnesses and oral testimony at trial." *Wells v. Tennessee Board of Regents,* 9 S.W.3d 779, 783-784 (Tenn.1999). An appellate court "may make an independent assessment of the credibility of the documentary proof it reviews without affording deference to the trial court's findings ." *Id.* at 783. When the proof is presented through a deposition, the appellate court can just as well judge the credibility of the witness as the trial court. *Id.* 784. There is no presumption of correctness with respect to the trial court's conclusions of law. *Campbell v. Florida Steel Corp.,* 919 S.W.2d 26, 35 (Tenn.1996) and Tenn. R.App. P. 13(d).

**Analysis**

The defendant contends that it is not responsible for 100% of Pellicano's injuries and resulting damages because Pellicano had a pre-existing herniated disk; emphasizing the fact that the pre-existing injury occurred a mere seven weeks prior to the incident at issue. Moreover, Defendant contends that while the incident may have exacerbated a pre-existing injury, the court should have apportioned the damages because the proof was insufficient to establish that the incident was the sole and proximate cause of Pellicano's need for the diskectomy. Defendant therefore concludes that the proof was insufficient to hold Defendant liable for all expenses related to the surgery, lost wages resulting from the surgery, and pain and suffering related to the surgery and recovery from surgery.

*3 A cause of action for negligence requires that five elements be established:(1) a duty of care owed by the defendant to the plaintiff; (2) conduct that falls below the applicable standard of care such that there is a breach of the duty of care; (3) an injury or loss; (4) causation in fact; (5) and proximate or legal cause. *McClenahan v. Cooley,* 806 S.W.2d 767, 774 (Tenn.1991). In this case Defendant concedes that it is responsible for exacerbating Pellicano's condition; thus, we need not address the first three elements and begin our inquiry with a focus on the fourth element, causation, to determine if the incident was the cause in fact for Pellicano's surgery. "Causation, or cause in fact, means that the injury or harm would not have occurred 'but for' the defendant's negligent conduct." *Kilpatrick v. Bryant,* 868 S.W.2d 594, 598 (Tenn.1993). In situations where two independent causes are present which alone could have produced the injury, the "but for" test may not be as effective and the court may consider whether the defendant's conduct was a "substantial

factor" in bringing about the harm. *Waste Management, Inc. of Tennessee v. South Central Bell Telephone Company,* 15 S.W.3d 425, 431 (Tenn.Ct.App.1997). The plaintiff has the "burden of introducing evidence that affords a reasonable basis for concluding that it is more likely than not that the defendant's conduct was a cause in fact of their injury." *Waste Management* at 433 (citing *Cook v. Spinnaker's of Rivergate, Inc.,* 878 S.W.2d 934, 939 (Tenn.1994).

The issue of causation in fact should be resolved before undertaking the issues of legal cause or allocating fault. *Waste Management* at 433. "Once it is established that the defendant's negligent conduct was, in point of fact, the actual cause of the plaintiff's injury or harm, the focus then becomes whether the policy of the law will extend responsibility for that negligent conduct to the consequences that have occurred." *Kilpatrick* at 598. Thus, we must first find that the incident was the cause in fact for the surgery as opposed to an injury to a lesser extent before considering whether the final element, that of proximate cause, has been satisfied.

Pellicano insists that his injuries, specifically the need for surgery, resulted from the incident with Defendant's ambulance, not the prior injury. He testified that the prior injury was not causing him any pain at the time of the incident with the ambulance, and that he was successfully recovering from the prior injury, though he was more vulnerable to injury. Pellicano further testified that he missed no work as result of the prior injury and was only placed on "light duty status" as a result of that injury. Pellicano's brother, Peter Pellicano, testified, stating that after the prior injury Pellicano was wearing a neck brace but getting better and that Pellicano, "did the normal things around the house, he did the shopping, mowed the lawn, whatever, played football with the guys,...."

> ***4** The liability of one who negligently or unlawfully injures the person of another is not to be measured by the physical strength of the party injured or his capacity to endure suffering. One of weak physical structure, or small vitality, or in ill health, has as much right to protection from violence as a robust athlete, and in either case the physical injury, the bodily harm, which is actually caused by the violence, whether one be strong or weak, healthy or sick, is the natural consequences of the wrong. The defendant is responsible for all ill effects which naturally and necessarily follow the injury in the condition of health in which the plaintiff was at the time of the fall, and it is no defense that the injury might have been aggravated and rendered more difficult to cure by reason of plaintiff's state of health at that time, or that by reason of latent disease the injuries were rendered more serious to her than they would have been to a person in robust health. If the afflictions which plaintiff had before the fall did not cause her pain and suffering, as she says they did not, but after the fall they did cause pain and suffering, the fall is the proximate cause of the injuries sustained. The defendant is not entitled to receive a reduction of the damages which plaintiff suffered on account of such infirmities. The foregoing statement of the rule is supported by a great preponderance of authority.

*Elrod v. Town of Franklin,* 140 Tenn. 228, 204 S.W. 298, 301 (Tenn.1918).

An often stated principle is that a tort feasor must accept the person as he finds him and the person injured by the tort feasor is entitled to recover all damages proximately caused by the acts of the tort feasor. A defendant is not "responsible for plaintiff's previous condition, except to the extent of aggravation or enhancement by defendants' acts." *Haws v. Bullock,* 592 S.W.2d 588, 591 (Tenn.Ct.App.1979). Thus, a plaintiff may recover for an increase in disability, but not for the total disability which resulted from the pre-existing condition plus aggravation of the pre-existing condition caused by the accident. *Kincaid v. Lyerla,* 680 S.W.2d 471, 473 (Tenn.Ct.App.1984).

A concise statement of the law regarding the aggravation of a pre-existing condition is found in the Tennessee Pattern Jury Instructions.

> A person who has a condition or disability at the time of an injury is entitled to recover damages only for any aggravation of the pre-existing condition. Recovery is allowed even if the pre-existing condition made plaintiff more likely to be injured and even if a normal, healthy person would not have suffered substantial injury.

A plaintiff with a pre-existing condition may recover damages only for any additional injury or harm resulting from the fault you may have found in this case. Damages shall include all the additional harm or disability even though it is greater because of the pre-existing condition [and even though the pre-existing condition caused no harm or disability before the occurrence].

*5 T.P.I. 3-Civil 14.14.

It is undisputed that Pellicano had a pre-existing injury. Moreover, Defendant has conceded that the incident "exacerbated" Pellicano's pre-existing condition and that the medical expenses for conservative care by Dr. Guillermin from the date of the incident up to the date of the surgery, in the amount of $1,277.20, were reasonable and necessary. While Defendant does not contest this portion of the award for medical expenses, it vigorously contends that Pellicano failed to present competent evidence sufficient to establish that the surgery was necessitated by the exacerbation of the pre-existing injury, arguing that the evidence established that it is just as likely that Pellicano would have needed the surgery if the incident had not occurred.

The testimony of Dr. Guillermin is central to the issue of whether there is sufficient evidence to establish that the surgery was necessitated by the incident. Dr. Guillermin did not treat Pellicano for the injury that occurred prior to the incident. Moreover, Dr. Guillermin did not see Pellicano before the incident and did not see nor treat him for any condition until May 4, 2002, some four months after the incident at issue. Dr. Guillermin initially treated Pellicano conservatively and then recommended a diskectomy. He performed the diskectomy on June 19, 2000. Dr. Guillermin testified by deposition. The following are pertinent parts of his testimony from the first of two depositions:

Q Doctor, can you tell me some more about what caused this man's injuries? Can we say whether his herniated disc was caused by the work comp accident or by the auto accident?

A The diagnostic imaging, which confirmed the diagnosis of a herniated disc, was done prior to the auto accident. So it doesn't make any difference what caused that. How it stands there, in relation to the auto accident, is of question. He had a ruptured disc before the auto accident, so the auto accident did not cause a ruptured disc; it exacerbated his symptoms.

Q I'm sorry, what kind of test did you say showed that he had a ruptured disc before?

A myelogram, followed by a CT scan.

Q So the work comp accident actually caused the herniated disc?

A Well, it hasn't been decided what caused the herniated disc. It makes no difference what caused the herniated disc, because whatever caused it, it was proved to be present on that day, and therefore anything that happens thereafter would exacerbate it.

Q Okay. But the auto accident didn't actually cause the herniation?

A That's correct. I mean he had a herniated disc before the auto accident.

Q And is it possible he would have had to have a diskectomy regardless of whether he had the auto accident?

Mr. Plummer: Object to the form of that. You may go ahead and answer.

*MS. BARKENBUS:* (CONTINUING)

The Witness: Yes.

Q Do you know whether he would have had to have a diskectomy regardless of the auto accident? I'm asking the same question a different way.

*6 Mr. Plummer: I object.

The Witness: There are no statistics on that to base a statement. The answer is maybe yes; maybe no.

Dr. Guillermin was deposed a second time, several months later, in which the following exchange took place:

Q In your last deposition you said that he might have needed a diskectomy even if he had never had the auto accident; is that correct?

.....

*BY MS. BARKENBUS:*

Q Do you recall saying that?

A I believe that was the question and I said maybe, yes.

Q Maybe, yes, that he might have needed the diskectomy, even if he had never had the auto accident?

A I believe that was the answer to the question previously.

Q Is that still your answer?

A Exactly as it was in the previous deposition, yes.

Q That he might have needed it anyway?

A Correct.

Q So you can't say with medical-a reasonable degree of medical certainty that the auto accident caused him to have the diskectomy, can you?

A Repeat that question, please.

Q Do we know that the-I'm sorry, let me start over. Do we know that the auto accident was the absolute reason that he needed to have the diskectomy?

A It wasn't the absolute reason.

Q Okay. And he may have needed to have one even if he hadn't had the auto accident; right?

A Correct.

In most cases medical causation and permanency must be established by expert medical testimony. *Thomas v. Aetna Life & Cas. Co.* 812 S.W.2d 278, 283 (Tenn.1991). If such testimony is speculative in nature, it is insufficient to establish causation. *Primm v. Wickes Lumber Co.,* 845 S.W.2d 768, 771 (Tenn.Ct.App.1992). The foregoing reveals that Dr. Guillermin, in response to several similar questions pertaining to whether the incident brought about the need for surgery, offered the flexible opinion: "maybe yes; maybe no" or words to that effect. When called upon to consider what is and is not sufficient proof to establish causation, our Supreme Court stated:

> "The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.... Prosser, Sec. 41, p. 269.
>
> .....
>
> "A doctor's testimony that a certain thing is *possible* is no evidence at all. His opinion as to what is possible is no more valid than the jury's own speculation as to what is or is not possible. Almost anything is possible, and it is thus improper to allow a jury to consider and base a verdict upon a 'possible' cause of death." *Palace Bar, Inc. v. Fearnot,* 269 Ind. 405, 381 N.E.2d 858, 864 (1978). "The mere possibility of a causal relationship, without more, is insufficient to qualify as an admissible expert opinion." *Kirschner v. Broadhead,* 671 F.2d 1034, 1039 (7th Cir.1982).
>
> *7 .....
>
> Nevertheless, a mere possibility is not an affirmative basis for a finding of fact. "In the language of the law of evidence, [a medical opinion suggesting] that which is merely possible, standing alone and not offered as auxiliary or rebuttal testimony is immaterial to the ascertainment of the fact and so is inadmissible as evidence of that fact." *Martin v. United States,* 284 F.2d 217, 219 (D.C.Cir.1960). *Kirschner v. Broadhead, supra,* 671 F.2d at p. 1039-1040.

*Lindsey v. Miami Development Corp.* 689 S.W.2d 856, 861-862 (Tenn.1985).

Dr. Guillermin's testimony pertaining to the important issue of whether the need for surgery was caused by the incident with the ambulance, "maybe yes; maybe no," is the epitome of being equivocal. Accordingly, we find that Dr. Guillermin's testimony, standing alone, is insufficient to establish that Defendant is liable for damages attributable to the surgery. However, an inference of causation may be drawn by the trial court where equivocal medical proof is combined with other evidence which supports a finding of causation. *Taylor v. Dyer,* 88 S.W.3d 924, 926 (Tenn.Ct.App.2002) (quoting *Tindall v. Waring Park Assoc.,* 725 S.W.2d 935, 937 (Tenn.1987)).[3] "Causation may be established by a combination of medical and lay testimony." *Id.* at 926. Thus, our next step is to analyze whether any other evidence presented by Pellicano is sufficient to show that the ambulance accident caused the need for surgery.

Pellicano and his brother, Peter, testified that he was injured prior to the ambulance accident, when a pipe fell on his neck

and shoulder at work, but he did not miss any work because of the prior injury. Peter Pellicano testified that Pellicano had recovered from the on-the-job injury and was doing the shopping, mowing the yard and playing football "with the guys," but that after the incident he could not do work around the house, pick up heavy items when shopping or mow the lawn. He also testified that Pellicano was in great pain after the incident and was losing a great deal of sleep after the incident.

Pellicano testified that he was restricted to "light duty" work by his first doctor, that he only suffered from pain in his shoulder and that he was "fine" before the incident. He stated that he was wearing a neck brace on the day of the incident but was not wearing it when the incident occurred. Pellicano admitted that he told the driver of the ambulance and the other paramedic (Jones and Wilson) that he was not injured. He further admitted that he did not seek medical care for four months after the incident, explaining that he did not seek medical care until he began suffering persistent numbness in his arms and fingers, pain, headaches and loss of sleep.

Pellicano testified that his injuries and surgery were the result of the incident with Defendant's ambulance; however, on cross examination the defense challenged the basis of his opinion as to causation.

***8** *BY MS. BARKENBUS:*

Q Okay. Your worker's comp accident was about seven weeks before the ambulance accident; right?

A I believe so, yes.

Q And you had pain in your arm as a result of the worker's comp accident, didn't you?

A Yes.

Q And I think you testified that you had pain from your shoulder to your elbow as a result of that-

A Yes.

Q-worker's comp accident? And the pipe that fell on you was about 20 feet long, wasn't it?

A Pretty close, yes.

Q And it was about 100 pounds, wasn't it?

THE COURT: He had pain from his shoulder to his elbow?

MS. BARKENBUS: Yes, ma'am.

*BY MS. BARKENBUS:*

Q That pipe was about 20 feet long that fell on you-

A Right.

Q-at your work comp accident?

A Right.

Q And that pipe weighed 100 pounds; right?

A Maybe not that heavy, it was plastic. You know, maybe pretty close. I'm not sure, I don't know exact weights on every pipe. I really don't know.

Q Can I ask you to look at this? That's the complaint that you filed in your worker's compensation lawsuit, isn't it?

A I believe so, yes.

Q And can you read Paragraph 5 for me?

A Actually I can't, because I don't have my glasses on. Could you read that for me?

.....

Q While unloading pipe at a job site, comma, the plaintiff was injured when a large piece of pipe approximately 12 inches by 20 feet and about 100 pounds fell and struck him on the back of the neck and right shoulder junction. Would you argue if I said that's what it says?

A No, that's what it says.

Q And in that complaint you said that you had suffered pain and injury as a result of that accident; right?

A Yes.

Q And isn't it true that you also said that your surgery had been caused by that accident?

A My surgery was caused by that accident?

Q By your worker's compensation accident?

A No, I don't believe so.

.....

Q It says, As a direct and approximate result of the accident the plaintiff had to undergo surgery and is still recovering at this time.

A Hmm.

Q That is the complaint that you filed in Davidson County Circuit Court, isn't it?

A I believe so.

Q For your worker's compensation accident?

A Yes.

.....

Q Mr. Pellicano, as a result of this worker's compensation accident you were wearing a neck brace, weren't you?

A Yes.

Q And you wore that all the time when you worked; is that correct?

A Yes.

Q And in fact you were wearing that neck brace on the day that you had the ambulance accident; right?

A Yes. Well, no, I didn't have it on at the time. I took it off to go home.

Q But you had been wearing it that day?

A Yes.

Q And where did that neck brace go?

A It's in my room right now.

Q Where did it fit on your body?

A Right around here [indicating].

Q And after the ambulance accident you continued to wear that neck brace; is that correct?

*9 A I'm sorry?

Q After the ambulance accident you continued to wear that neck brace; correct?

A No, not-well, in a way, yes, I did; in another way, no, I did not.

Generally, a lay witness should testify about facts observed, not about the witness's opinions or inferences. Neil P. Cohen, *et al., Tennessee Law of Evidence,* § 7.01[4][a], (4th ed. 2000 & Supp.2003). "Lay testimony is competent to establish such simple but important matters as existence of pain, its location, inability to work, etc. but it may not be received and relied upon to prove matters requiring scientific knowledge." *American Enka Corp. v. Sutton,* 216 Tenn. 228, 391 S.W.2d 643, 648 (Tenn.1965). Causation should be established by medical experts in all but simple and routine cases-and even then expert testimony is highly desirable. *Id.* at 647 (citing 2 Larson, *Workmen's Compensation Law* (1961)).

An example of a "simple" injury that would allow testimony by a layperson as to causation is found in *Varner v. Perryman,* an auto accident case. In *Varner,* the court considered whether plaintiff's testimony, that he received a bruised stomach muscle as a result of the accident, was sufficient to establish causation. The court found that the existence of a bruise would be the kind of "simple" injury that would allow a layperson to testify as to causation. *Varner v. Perryman,* 969 S.W.2d 410, 412 (Tenn.Ct.App.1997) (citing *American Enka Corp. v. Sutton,* 216 Tenn. 228, 391 S.W.2d 643 (1965)). Our Supreme Court addressed the important differences between simple injuries, for which lay persons are permitted to opine, and more complex medical issues, for which only experts are permitted to opine, in *American Enka Corp. v. Sutton,* 216 Tenn. 228, 391 S.W.2d 643, 646-648 (Tenn.1965).[4] The issue the court was dealing with in *Sutton* was whether the injured lay person could provide competent proof as to causation of a nerve injury to his eye which he claimed to have resulted from a chemical accident. The court stated:

> It must be remembered that we are dealing with delicate mechanisms of the eye, including the optic nerve and to make an award in this case based upon conclusions unsupported by scientific knowledge is not sufficient to meet the requirement that there shall be material evidence to support the award.
>
> Petitioner cites the case of *Fidelity & Cas. Co. of New York v. Treadwell,* 212 Tenn. 1, 367 S.W.2d 470 (1963), quoting a statement therein that: ' * * * the testimony of an injured person as to the extent of his injuries may be believed in preference to the opinions of 'a whole college

> of physicians' testifying to the contrary.' 212 Tenn. at 9, 367 S.W.2d at 474.
>
> This may be true as to the extent of injuries, but it does not apply to causal connection between an accident and resultant injury. In the case *sub judice* there is no argument as to the extent of injury, but rather as to the causal connection.
>
> .....
>
> In the recent case of *Magnavox Company of Tenn. v. Shepherd,* 214 Tenn. 321, 379 S.W.2d 791 (1964), we reversed the action of the trial court in granting an increase to an award previously made because there was no competent proof of causal connection between the original injury and the alleged increased disability. In the *Shepherd* case the employee and her husband testified that her increased disability was due solely to her original injury. An expert medical doctor testified there was no causal connection between the original injury and the increased disability. We held therein and now reaffirm that:
>
> > ***10** Lay testimony is competent to establish such simple but important matters as existence of pain, its location, inability to work, etc., but it may not be received and relied on to prove matters requiring scientific knowledge.
>
> The only competent evidence based upon scientific knowledge offered in this case is against the award.

*American Enka Corp. v. Sutton,* 216 Tenn. 228, 391 S.W.2d 643, 646-648 (Tenn.1965).

The testimony of Pellicano and his brother is the only testimony, other than Dr. Guillermin's equivocal opinion, concerning whether Pellicano's need for surgery was caused by the incident with the ambulance. Pellicano and his brother are lay witnesses. It is well established that Tenn. R. Evid. 701 does not authorize lay testimony on subjects that require special skill or knowledge outside the realm of common experience. *Tennessee Law of Evidence* at § 7.01[4][b]. "In situations where a witness 'cannot readily and with equal accuracy and adequacy' testify without an opinion, the witness may state opinions requiring *no expertise.*" Tenn. R. Evid. 701, Advisory Commission Comment. (emphasis added) While their lay testimony is competent to establish that Pellicano incurred pain following the incident and that he had pain and numbness in his arms weeks later, their lay testimony is insufficient to establish a cause in fact relationship between the incident and the need for a diskectomy.

Based upon the judgment, it is obvious that the court found Pellicano's testimony, along with that of his brother, sufficiently credible and competent to establish that Pellicano had essentially recovered from his prior injury, with the exception of some pain and discomfort, that all of his subsequent problems were the result of the exacerbation of the pre-existing injury and, therefore, the damages should be assessed against Defendant and not apportioned. Since Dr. Guillermin gave no opinion as to causation (maybe yes; maybe no), it is also obvious that the trial court found Pellicano's testimony, along with that of his brother, sufficiently credible and competent to establish that the incident was the cause in fact of the surgery and that all of Pellicano's medical expenses, pain and suffering and lost wages were attributable to the incident with the ambulance.

The evidence does not preponderate against the trial court's finding that the incident exacerbated the pre-existing injury; however, we respectfully disagree with the trial court's finding that the incident was the cause in fact of the need for surgery. The only basis upon which the trial court could have reached that conclusion would be the lay testimony of Pellicano and his brother. [5] In our opinion, the evidence preponderates against the trial court's finding of a cause in fact relationship between the incident and the need for surgery for a number of reasons. Pellicano failed to provide a convincing explanation why he attributed the need for surgery to the worker's compensation accident and thereafter to the incident with the ambulance in the absence of competent expert proof, which undermined his credibility. Moreover, the lay testimony as to causation is in conflict with *Taylor* for it, in essence, constituted an opinion that the surgery was necessitated by the incident. Pellicano and his brother's lay opinion testimony does not qualify for the "simple assessment of medical causation" exception in *Taylor.* Such opinion testimony requires scientific knowledge which Pellicano and his brother do not possess. Accordingly, we hold that the lay opinion testimony as to the cause in fact for the surgery was not competent and therefore was insufficient to cure the deficiencies of the equivocal medical proof offered by Dr. Guillermin.

***11** Therefore we find that Pellicano provided sufficient competent proof to establish that the incident with Defendant's ambulance exacerbated his pre-existing neck injury to some degree; however, the evidence preponderates

against the trial court's finding that the incident was the cause in fact of the need for surgery. Thus, the proof was insufficient to hold Defendant liable for all of the expense of the surgery and any damages attributable thereto.

Consequently, we reverse the trial court's holding that the incident with Defendant's ambulance was the cause in fact of Pellicano's need for surgery. Due to our finding that the incident was not proven to be the cause in fact for the surgery, we also vacate the trial court's award of damages for medical expenses, pain and suffering and lost wages attributable to the surgery. Nevertheless, in that Defendant conceded that Pellicano is entitled to recover his medical expenses for conservative care administered by Dr. Guillermin prior to the surgery in the amount of $1,277.20, we therefore modify and reduce the award for medical expenses to $1,277.20. [6]

In that the proof sufficiently established that the incident exacerbated the pre-existing neck injury, particularly the pain and suffering associated with the exacerbation of the neck injury, this matter is remanded to the trial court for determination of the plaintiff's claim for pain and suffering to the extent it was exacerbated by the incident.

Therefore, this matter is remanded to the trial court for appropriate proceedings consistent with this opinion.

Costs are taxed to Appellee, Dominic P. Pellicano.

Footnotes

1 A workers' compensation action, Davidson County Circuit Court Docket No. 00C-2706, was filed by Dominic Pellicano against A-H Mechanical Contractors, Inc. The record does not indicate whether Pellicano received any recovery from that action.

2 Dr. Guillermin performed the diskectomy.

3 The court in *Taylor v. Dyer* recognized that it was deriving this reasoning regarding causation and the use of lay testimony from worker's compensation cases but opined that the principles would also apply to an auto accident case as was involved in *Taylor*.

4 *Sutton* is a workers' compensation case; nevertheless, the evidentiary issues presented are applicable to this action.

5 It could not be based upon the expert testimony of Dr. Guillermin for he did not give an opinion as to causation.

6 Due to Defendant conceding that it is liable for $1,277.20 of Pellicano's medical expenses, we have not considered whether the causation evidence concerning these medical expenses is sufficient.

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2007 WL 935713
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Larry D. PITTENGER, et al.
v.
RUBY TUESDAY, INC.

No. M2006-00266-COA-R3CV. | Dec. 6, 2006 Session. | March 28, 2007.

Appeal from the Circuit Court for Davidson County, No. 03C-3645; Walter Kurtz, Judge.

**Attorneys and Law Firms**

Steven E. Sager, Nashville, Tennessee, for the appellants, Larry D. Pittenger and Lucy Pittenger.

Paul M. Buchanan, Julie B. Peak, Nashville, Tennessee, for the appellee, Ruby Tuesday, Inc.

WILLIAM B. CAIN, J., delivered the opinion of the court, in which PATRICIA J. COTTRELL and FRANK G. CLEMENT, JR., JJ., joined.

**Opinion**

## OPINION

WILLIAM B. CAIN, J.

*1 Restaurant patron and wife filed negligence and negligence *per se* action against restaurant for injuries patron received to his ankle while attempting to open restaurant door for wife. Restaurant filed motion for summary judgment, which trial court granted dismissing all of Plaintiffs' claims. Plaintiffs appealed. We affirm the decision of the trial court, finding that (1) Plaintiffs failed to show that restaurant breached any duty to patron; and (2) Plaintiffs failed to establish that the building code imposed an obligation on Defendant.

On January 4, 2003, Mr. Larry Pittenger visited the Ruby Tuesday restaurant at the Hickory Hollow Mall in Antioch, Tennessee. The entrance to the restaurant rested upon a two inch platform covered with black and white tile, the edge of which was gently sloped. As Mr. Pittenger entered the restaurant, he attempted to turn around and open the door for his wife, while holding his thirty-five pound daughter. At this time, his left foot was allegedly inside the restaurant while his right foot was allegedly outside the restaurant with a one to two inch brass threshold between his feet. When he reached around to push the door back open, Mr. Pittenger claimed that his right ankle rolled over the edge of the tiled platform resulting in an injury to his ankle. Mr. Pittenger claims that at the time of the incident, he did not notice the gently sloping platform.

On December 29, 2003, Mr. and Mrs. Pittenger filed an action against Ruby Tuesday under the theories of negligence and negligence *per se* due to alleged violations of the applicable building code. On November 10, 2005, Ruby Tuesday filed a motion for summary judgment arguing that it did not breach any duty to Mr. Pittenger, Mr. Pittenger failed to establish cause in fact, Mr. Pittenger was more than fifty percent at fault, and Ruby Tuesday did not have actual or constructive notice of the alleged defect or dangerous condition. On January 19, 2006, the trial court granted Defendant's motion finding that Mr. Pittenger's injury was not foreseeable, the doctrine of negligence *per se* was inapplicable because the building code imposed a duty on the builder of the premises not the occupant, and the threshold was open and obvious and thus Mr. Pittenger was at least fifty percent at fault. Plaintiffs appeal.

Summary judgment is appropriate only where the undisputed facts and the inferences reasonably drawn from the undisputed facts, support one conclusion-that the party seeking summary judgment is entitled to a judgment as a matter of law. *Webber v. State Farm Auto Ins. Co.*, 49 S.W.3d 265, 269 (Tenn.2001). "To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense." *Staples v. CBL & Assocs., Inc.*, 15 S.W.3d 83, 88 (Tenn.2000). If the moving party satisfies the requirements of Tennessee Rule of Civil Procedure 56, the non-moving party bears the burden of demonstrating how these requirements have not been met either "(1) by pointing to evidence either overlooked or ignored by the moving party that creates a factual dispute, (2) by rehabilitating evidence challenged by the moving party, (3) by producing additional evidence that creates a material factual dispute, or (4) by submitting an affidavit in accordance with Tenn. R. Civ. P. 56.07 requesting additional

time for discovery." *Pendleton v. Mills,* 73 S.W.3d 115, 121 (Tenn.Ct.App.2001).

***2** When reviewing a motion for summary judgment, courts must consider the evidence in the light most favorable to the non-moving party and must resolve all reasonable inferences in the non-moving party's favor. *Doe v. HCA Health Servs. of Tenn., Inc.,* 46 S.W.3d 191, 196 (Tenn.2001). The standard of review for a grant of summary judgment is *de novo* upon the record with no presumption that the trial court's conclusions were correct. *Mooney v. Sneed,* 30 S.W.3d 304, 306 (Tenn.2000).

Plaintiffs first claim that the trial court erred in dismissing their negligence action. A claim for negligence requires that the plaintiff prove the following elements: "(1) a duty of care owed by the defendant to the plaintiff; (2) conduct by the defendant falling below the standard of care amounting to a breach of that duty; (3) an injury or loss; (4) causation in fact; and (5) proximate or legal cause." *Turner v. Jordan,* 957 S.W.2d 815, 818 (Tenn.1997). The Tennessee Supreme Court has explained that "[t]he duty element is a question of law requiring the court to determine 'whether the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant.' " *Rice v. Sabir,* 979 S.W.2d 305, 308 (Tenn.1998) (quoting W. Page Keeton, *Prosser & Keeton on Torts,* § 37 at 236 (5th ed.1984)). "In a premises liability case, an owner or occupier of premises has a duty to exercise reasonable care with regard to social guests or business invitees in the premises. The duty includes the responsibility to remove or warn against latent or hidden dangerous conditions on the premises of which one was aware or should have been aware through the exercise of reasonable diligence." *Rice,* 979 S.W.2d at 308.

In this case we believe that even if the entrance to Defendant's restaurant was sloping, Plaintiffs failed to offer any evidence that Defendant breached the duty of reasonable care. It is clear from Mr. Pittenger's deposition that he did not know what caused the injury to his ankle. Instead, he assumed that the weight of the entrance door and possibly the tiled platform on which the entrance rested caused his ankle to roll, even though Mr. Pittenger admitted that at the time of the incident he did not notice anything unusual about the entrance. Mr. Pittenger testified:

> Q. Well, let me break it down so you understand what I'm asking. Before you tried to open the door, both your foot-one foot was on the solid black entryway tile and one foot was across the threshold on the multicolored tile which is inside the door; is that right?
>
> ...
>
> A. Yeah. Yeah.
>
> Q. Okay. And then you tried to hold the door. Did your left foot remain inside the building?
>
> A. I believe it did.
>
> Q. Okay.
>
> A. I'm not 100 percent certain of everything that happened right there, but I believe I still had one foot in and one foot out of the threshold.
>
> ...
>
> Q. Okay. And what you're telling me is you made a step with your right foot to open the door-or hold the door open for your wife; is that right?
>
> ***3** A. I can remember the door shutting and pushing it back open.
>
> ...
>
> A. Reaching out, you know, to push it back open. That's what I remember.
>
> Q. Okay. But what you're telling me is you must have moved your right foot so that part of it was hanging over the two-inch step up between the concrete and the black tile so that your foot would have hold; is that right?
>
> A. My foot had to get there somehow.
>
> Q. Okay. And so you would have taken a step backwards, and you would have stepped onto the edge there between the black tile and the concrete, which would have caused your foot to roll one way or another; is that right?
>
> A. Well, if I would have stepped backwards, I would not be in the other doorway, though, if you step backwards.
>
> Q. Well, let me ask it this way. Did-
>
> A. I don't remember about the steps and stepping and which foot I stepped which way.
>
> Q. All right. Well, let me ask it this way. Your foot rolled. Did it roll because part of your foot was on the black tile

and part was on the edge where there's a two-inch step up?

A. I don't think so. I think I was just close to the edge and it rolled. Also, if you look at the picture there's a little bit of a radius here, and that might have had something to play with it too. Did you see that?

...

A. I mean, I don't think my foot was half on or half off. I think just my foot was on top of it and it was just me reaching out-I don't know. Maybe the curvature at the edge, too, had something to do with it.

...

Q. Okay. And so if your foot was fully on the black tile, what caused your ankle to roll?

A. My weight shifting to push the door open. And probably this-the way this step is made added to it, you know.

Negligence is not to be presumed from the mere happening of an accident. *Brackman v. Adrian,* 472 S.W.2d 735, 739 (Tenn.Ct.App.1971); *Friedenstab v. Short,* 174 S.W.3d 217, 219 (Tenn.Ct.App.2004). Negligence shall not be presumed absent an affirmative demonstration from the evidence. *Wiedel v. Remmel,* 328 N.E.2d 391, 393 (Ohio 1975). Therefore, in the context of injuries to plaintiffs resulting from a fall, "mere speculation about the cause of an injury is insufficient to establish liability on a negligence claim." *Cohen v. Meridia Health Sys.,* No. 87001, 2006 WL 1935068, at *2 (Ohio Ct.App. Jul. 13, 2006). "As such, a plaintiff will be prevented from establishing negligence when he, either personally or with the use of outside witnesses, is unable to identify what caused the fall. In other words, a plaintiff must know what caused him to slip and fall. A plaintiff cannot speculate as to what caused the fall." *Beck v. Camden Place at Tuttle Crossing,* No. 02AP-1370, 2004 WL 1277044, at *2 (Ohio Ct.App. Jun. 10, 2004) (internal citations omitted); *see also Sparks v. Knoxville Util. Bd.,* No. 03A01-9803-CV-00092, 1998 WL 668719, at *1 (Tenn.Ct.App. Sept. 30, 1998) ("In a premises liability case such as this one, the plaintiff must prove, among other things, that he or she was injured by a dangerous or defective condition on the defendant's property").

*4 In this case, Mr. Pittenger assumed that a combination of the weight of the entrance door and the slope of the tiled platform caused his ankle to roll as he turned to open the door for his wife; however, such an assumption is nothing more than speculation. Mr. Pittenger cannot state with definiteness what caused his injury and we cannot presume negligence absent an affirmative demonstration from the evidence. Plaintiffs would have us infer that Defendant was negligent merely because Mr. Pittenger was injured on its premises. However, as the Supreme Court of Ohio succinctly explained, "in order for an inference to arise as to negligence of a party, there must be direct proof of a fact from which the inference can reasonably be drawn. A probative inference for submission to a jury can never arise from guess, speculation or wishful thinking. The mere happening of an accident gives rise to no presumption of negligence." *Parras v. Std. Oil Co.,* 116 N.E .2d 300, 303 (Ohio 1953). Accordingly, we find no error in the trial court's dismissal of Plaintiffs' negligence claim.

Plaintiffs also claim that the trial court erred in finding that the building code did not impose an obligation on Defendant and thus the doctrine of negligence *per se* was inapplicable.

> In order to recover under the theory of negligence per se, a party must establish three elements. First, the defendant must have violated a statute or ordinance that imposes a duty or prohibition for the benefit of a person or the public. *Memphis Street Railway Co. v. Haynes,* 112 Tenn. 712, 81 S.W. 374 (1904). Second, the injured party must be within the class of persons intended to benefit from or be protected by the statute. *Traylor v. Coburn,* 597 S.W.2d 319 (Tenn.App.1980). Finally, the injured party must show that the negligence was the proximate cause of the injury. *Long v. Brookside Manor,* 885 S.W.2d 70 (Tenn.App.1994).

*Harden v. Danek Med., Inc.,* 985 S.W.2d 449, 452 (Tenn.Ct.App.1998).

Plaintiffs argue that Defendant is liable under the doctrine of negligence *per se* because Defendant occupied the building since its construction and according to their expert witness, Mr. Leonard Celauro, the entrance to the restaurant violated the building code in effect at the time the establishment was built. In making their argument, Plaintiffs contend that the building code applies to whomever has control of the

premises, regardless of whether the occupant constructed or owned the building. Defendants conversely assert that there is no authority which states that lessees or occupants of a commercial building are legally responsible for the restrictions contained in the building code.

Tennessee courts have applied the doctrine of negligence *per se* in limited situations involving violations of the building code. In *Smith v. Owen,* 841 S.W.2d 828, 833 (Tenn.Ct.App.1992), the court found a landlord negligent *per se* because the building code expressly prohibited the renting of a dwelling for living purposes without a prior inspection in order to assure that the premises met certain standards. The proof showed that the landlord rented the premises without obtaining such an inspection and that an inspection would have likely revealed the defect that caused plaintiff's injury. *Smith,* 841 S.W.2d at 833.

*5 In *Kingsul Theatres, Inc. v. Quillen,* 196 S.W.2d 316 (Tenn.Ct . App.1946), the court found a movie theater operator negligent *per se* for injuries patron sustained when she fell on steps while exiting the building. The city building code specifically provided:

> Theatre, moving picture houses and all places where large public assemblages are frequent, shall have its entrance floor reached by gradient from the sidewalk, and no steps shall be built in any passage way leading to said entrance floor.

*Kingsul Theatres, Inc.,* 196 S.W.2d at 318.

The court found that because Defendant, as lessee, chose to use the building as a theater rather than for some other purpose not specifically regulated by the ordinance, the lessee was subject to the obligations of that ordinance. *Kingsul Theatres, Inc.,* 196 S.W.2d at 318.

In both of the above discussed cases, the building code placed an express restriction on defendant or defendant's particular use of a building. There is no such express restriction on Defendant in this case. Plaintiffs failed to make the building code part of the record and therefore failed to show that the provisions of the code which Defendant allegedly violated expressly applied to Defendant as a lessee or occupant of a commercial building. Alternatively, Plaintiffs failed to point the Court to any authority which states that lessees or occupants of a commercial building are legally responsible *in general* for the obligations contained in the building code. Rather, it would appear to the Court that if the building code were applicable, the provisions would impose a general duty on the builder of the restaurant instead of the occupant of the premises. Since Plaintiffs failed to establish that Defendant violated a statutory duty, we find that the trial court properly dismissed Plaintiffs' negligence *per se* claim.

Finding no merit in Plaintiffs' negligence and negligence *per se* claims, the judgment of the trial court is affirmed in all respects. The costs of appeal are assessed against Appellants, Mr. and Mrs. Pittenger.

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2009 WL 2877415
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Curtis Robin RUSSELL, et al.,
v.
ANDERSON COUNTY, et al.

No. E2008-00925-COA-R3-CV. |
April 15, 2009 Session. | Sept. 8, 2009.

Direct Appeal from the Circuit Court for Anderson County, No. A4LA0692; Hon. Jon Kerry Blackwood, Circuit Judge.

**Attorneys and Law Firms**

Benjamin Lauderback, Knoxville, Tennessee, for appellant, City of Clinton, Tennessee.

Tasha C. Blakney and Ronald C. Koksal, Knoxville, Tennessee, for appellees, Curtis Robin Russell and Dorothy Louise Russell.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which D. MICHAEL SWINEY, J., and JOHN W. McCLARTY, J., joined.

**Opinion**

**OPINION**

HERSCHEL PICKENS FRANKS, P.J.

***1** In this wrongful death action, the Trial Court assessed 50% fault for the death to plaintiff mother, and 50% fault to defendant. The Complaint charged that the motor vehicle operator who struck decedent was at fault in the accident, but plaintiff settled with that defendant and the action was dismissed as to the defendant. The Trial Judge pretermitted the issue of fault chargeable to the dismissed defendant. On appeal, we vacate the Trial Court's Judgment and remand with instructions to rule on the pretermitted issue.

This appeal arises from a wrongful death suit filed by plaintiffs, Curtis Robin Russell (Robin Russell) and Dorothy Louise Russell (Dorothy Russell) (collectively the Russells) following an accident on November 3, 2003 when the Russells' seven year old son, Curtis Tyler Russell, was struck by a motor vehicle while crossing the street, resulting in the death of the child.

The Russells in this action joined as defendants the City of Clinton, Clinton Utilities Board, Anderson County, Anderson County Schools, Anderson County Board of Education and Ladislav M. Misek, the driver of the truck involved in the accident.

The Complaint alleged that the Russells' seven year old son attended a regional basketball tournament in Clinton with his family at the Clinton Middle School which is operated by Anderson County, Anderson County Schools and Anderson County Board of Education. Shortly after 7:00 p.m., Curtis left the gym of the school with his eleven year old cousin to retrieve a personal item from the cousin's family vehicle. The Complaint stated that at the intersection of North Hicks Street and West Board Street the boys started to cross West Broad Street in the cross walk when Curtis was struck by a vehicle driven by Ladislav Misek.

The Complaint asserted various causes of action against the defendants. As pertinent to this Opinion the Complaint alleged that Ladislav Misek, as the driver of the vehicle that struck Curtis, is liable to plaintiffs for failure to keep a proper lookout, failure to control his vehicle, failure to yield to a pedestrian in a crosswalk, and failure to exercise caution under the circumstances. Misek additionally was alleged to have violated Tenn.Code Ann. §§ 55-8-134, 55-8-136 and 55-8-153. Further, the Complaint stated that a blood test Mr. Misek submitted to following the accident showed the presence of a sedative-like medication that could effect his ability to operate a motor vehicle.

Defendant/appellant, the City of Clinton, filed an Answer to the Amended Complaint denying all claims made against it. The City of Clinton invoked the Tennessee Governmental Tort Liability Act (GTLA) and all immunities to which it was entitled under the Act as an affirmative defense. The City of Clinton also pled as an affirmative defense the doctrine of comparative fault as to the actions of Curtis and his parents as well as to the actions of all other defendants.

The Russells settled and dismissed their claims against Mr. Misek and the Clinton Utilities Board. Summary judgment was granted to the Anderson County Board of Education and Anderson County was voluntarily dismissed pursuant to Tenn. R. Civ. P. 41.01. The Russells' case against the City of

Clinton was tried, without a jury, and the Trial Court entered an Order finding the City of Clinton and Mrs. Russell each 50% at fault for the wrongful death of Curtis. The Court stated that it was undisputed that the City of Clinton owned and controlled the intersection at issue and that the intersection is a school zone. The intersection was determined to be dangerous, defective and unsafe because it lacked pedestrian head signals as required by Section 4E.04 of the Manual of Traffic Control Bulletin (MUTCB). The MUTCB requires pedestrian head signals to be in place in a school zone at any signalized location. The Court found that a pedestrian head signal was accordingly required even after school hours. The Court also found the traffic light provided inadequate warning to pedestrians as they cross from the traffic island across Broad Street because the light is difficult to observe when the pedestrian is within two feet of the edge of the island. The Court concluded the City of Clinton was on notice of the defective condition of the intersection created by the lack of pedestrian head signals for two reasons. First, a School Board member had requested the placement of pedestrian head signals at that particular intersection and the City of Clinton had investigated the cost of various types of signals in response to the request. Second, the Court noted the city was on notice because the MUTCB required use of a pedestrian head signal at the intersection as it was a signalized school zone. Based on these conclusions, the Court held that the City of Clinton was negligent in its failure to provide pedestrian head signalization for the intersection at issue and this negligence was in part the cause of Curtis' death.

***2** The Court also concluded that Mrs. Russell was also negligent in allowing Curtis to leave the gym in the company of another child under the circumstances. The Court also found that Mrs. Russell's negligence was also a cause of her son's death and, after comparing her fault to that of the City of Clinton's, attributed each with 50% of the fault.

The City of Clinton filed a notice of appeal and the Russells filed a notice of cross appeal. This Court entered an order on July 17, 2009 stating that the appeal did not meet the requirements of an appeal pursuant to Tenn. R.App. P. Rule 3 because the record established that there had been no adjudication of the claim against Anderson County Schools nor had Ms. Russell's independent claim for negligent infliction of emotional distress been adjudicated. This Court ordered the parties to demonstrate to the Court that all issues are resolved or to furnish an order certifying the appeal pursuant to Rule 54.02, and the parties then complied with that order.

Upon reviewing the record, we pretermit all issues raised except whether the Trial Court erred in failing to consider the fault of all parties, specifically the driver of the vehicle that struck Curtis Russell?

Plaintiffs/appellees contend that the Trial Court erred when it failed to consider the fault of any parties other than the City of Clinton and Mrs. Russell. Specifically, plaintiffs argue that the fault of the driver of the truck that struck and killed Curtis, Ladislav Misek, should have been considered by the Trial Court. In support of this position, plaintiffs rely on *Lindgren v. City of Johnson City,* 88 S. W.3d 581 (Tenn.Ct.App.2002) where this Court stated as follows:

> The Trial Court has the responsibility to apportion fault to anyone having a degree of culpability. *See Carroll v. Whitney,* 29 S. W.3d 14, 22 (Tenn.2000); *Dotson v. Blake,* 29 S. W.3d 26 (Tenn.2000); *Bervoets v. Harde Ralls Pontiac-Olds, Inc.,* 891 S. W.2d 905 (Tenn.1994). The trier of fact in a comparative fault case, such as this, should first determine the total amount of the plaintiff's damages without regard to fault, and then apportion damages on the percentage of fault attributable to each tortfeasor. *Grandstaff v. Hawks,* 36 S. W.3d 482 (Tenn.Ct.App.2000). In this case, the Trial Court did not follow this procedure, although defendant .... had raised the comparative fault of [the dismissed defendant] as an affirmative defense.

*Lindgren* at 585.

The *Lindgren* case involved a claim under the GTLA. The Trial Court found the municipal defendant to be 100% at fault for the plaintiff's injuries but did not consider the fault of another defendant who had been dismissed pursuant to a compromise with the plaintiff. This Court found the Trial Court erred when it failed to consider the fault of all tortfeasors and had "pretermitted the issue of whether any fault should be apportioned" to a party who had been dismissed from the lawsuit prior to trial, even though the municipal defendant had raised comparative fault of the dismissed party as an affirmative defense. The Court noted

that the dismissed party had, like Mr. Misek, reached a settlement with the plaintiff, and this Court vacated the judgment against the municipal defendant and remanded with directions to the trial court ... "without hearing further proof, to determine the total amount of damages to which plaintiff would be entitled, and then determine the percentage of fault, if any, attributable to the [settling defendant], and then enter Judgment against [the municipal] defendant, based upon the percentage of fault attributed to the [municipal defendant] in accordance within the constraints of the Governmental Tort Liability Act." *Id.*

*3 We hold that the Trial Court committed reversible error when it failed to rule on the issue of negligence and fault to be attributed to Mr. Misek. We vacate the Judgment and remand.

We further hold there is material evidence relating to the culpability and fault to be attributed to Mr. Misek. [1]

It is a basic requirement of due care in the operation of a vehicle that the driver keep a reasonably careful lookout for traffic upon the highway commensurate with the dangerous character of the vehicle and nature of the locality and to see all that comes within the radius of his line of vision both in front and to the side. *Jacocks v. Memphis Light, Gas & Water,* No. W2008-00802-COA-R3-CV, 2008 WL 4613570 at * 2 (Tenn.Ct.App. Oct. 13, 2008)(citing *Van Sickel v. Howard,* 882 S.W.2d 794, 798 (Tenn.Ct .App.1994); *Frady v. Smith* 519 S.W.2d 584, 587 (Tenn.1974). The evidence shows that because Mr. Misek was admittedly aware of the presence of the children at the edge of the traffic island, Mr. Misek had a heightened duty of care because "[w]here the presence of children is known to the driver, Tennessee law places upon a driver a duty of care to consider childish behavior and to take precautions accordingly. *Kim v. Boucher* 55 S. W.3d 551, 558 (Tenn.Ct.App.,2001)(citing *Staley v. Harkleroad,* 501 S.W.2d 571 (Tenn.Ct.App.1973)." The *Kim* court explained that "[c]hildren, wherever they go, must be expected to act upon childish instincts and impulses; and others who are chargeable with a duty of care and caution towards them, must calculate upon this, and take precaution accordingly." *Kim* at 558 (citing *Townsley v. Yellow Cab Company,* 145 Tenn. 91, 237 S.W. 58 (1922) (quoting *Ficker v. Cleveland etc., R. Co.,* 7 Ohio N.P. 600)); *see also Townsley v. Yellow Cab Co.,* 145 Tenn. 91, 237 S.W. 58 (1921).

The Judgment of the Trial Court is vacated and the cause remanded to reconsider its Opinion and to apportion fault to anyone having a degree of culpability.

The cost of the appeal is assessed one half to the plaintiff and one-half to the City of Clinton, Tennessee.

Footnotes

1 Misek was subpoenaed to testify at trial, but did not appear. Portions of his deposition were read into evidence. Misek, age 85, testified that he saw the boys standing right next to the curb on the island as he approached the intersection. He described his view of the boys as "just a glance". While he stopped at the light, he looked down both Broad Street and Hicks Street to see if traffic was coming but he did not look to his left at the boys he had previously observed. When he entered the intersection he did not see the boys because he was not paying attention to them, he was paying attention to traffic. He never saw Curtis before the impact and he first thought he had hit an animal.

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2011 WL 1648088
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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

Elizabeth C. WRIGHT,

v.

Frederico A. DIXON, III.

No. E2010–01647–COA–R3–CV. |
March 7, 2011 Session. | May 2, 2011.

Appeal from the Chancery Court for Knox County, No. 173056–3; Michel W. Moyers, Chancellor.

**Attorneys and Law Firms**

James B. Johnson, Nashville, Tennessee, for the appellant, Frederico A. Dixon, III.

Lewis S. Howard, Jr., and Elizabeth S. Dodd, Knoxville, Tennessee, for the appellee, Elizabeth C. Wright.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the Court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J ., joined.

**Opinion**

## OPINION

HERSCHEL PICKENS FRANKS, P.J.

***1** In this action to enforce a contract for the sale of real estate against defendant buyer, the Trial Court held that defendant failed to make reasonable efforts to obtain a loan in accordance with the requirement to obtain a mortgage for 100% financing, and awarded damages to plaintiff for breach of the contract since the plaintiff had sold the property before trial. On appeal, we hold that the evidence preponderates against the Trial Judge's finding that the defendant failed to put forth reasonable efforts to obtain a loan which was a condition in the contract for purchase of the property, and remand.

Plaintiff brought this action seeking specific performance and damages against defendant, based on a contract to purchase real property located in Knoxville.

Plaintiff alleged defendant submitted an offer in the form of a Purchase and Sale Agreement to purchase the property. The Agreement provided for a closing date of June 13, 2008, and the date was extended by amendment to June 20, 2008. Plaintiff alleged that defendant failed to close and refused to provide his mortgage broker with necessary and requested information to process his loan.

Plaintiff alleged that she had complied with all contingencies of the agreement and was ready, willing and able to close on the sale, and asked the Court to award her compensatory and special damages if the specific performance was not granted.

The Trial Court held a hearing on April 22, 2010, and plaintiff testified that she was a realtor and listed her property for sale. Defendant submitted an offer, and plaintiff testified that she countered on the price and defendant countered that, and she countered again, and defendant submitted a counter-offer to include two adjoining lots. Plaintiff testified that she accepted the counter offer, and considered a binding agreement to have been reached.

Plaintiff testified that defendant began asking to delay the closing while waiting on a loan agreement. She testified that she never received written notice that the deal would not be closed and that on July 1, she received a faxed document from defendant's realtor asking that the earnest money be released to defendant. Plaintiff testified she refused to sign the document, and that she never had any conversation directly with defendant, but rather handled everything through his realtor. Plaintiff testified that she subsequently sold the house and one of the lots for less than defendant's contract called for.

Defendant then testified and brought witnesses who were connected with mortgage companies, and offered evidence that he was unable to get a loan for 100% financing as the contract of sale was conditioned on 100% financing.

The Trial Court took the matter under advisement, and later entered a Memorandum Opinion and Order, and found:

> "[t]hat agreement contained a contingency that rendered performance contingent upon defendant's ability to secure 100% financing, and further that the loan could be conventional or 'other'. Defendant was required to apply for the loan within five days of the binding

> agreement date, and was required to notify plaintiff's representative of the loan application and of the lender's name and contact information."

*2 The Trial Court then found that defendant made no effort to secure financing pursuant to the agreement until June 12, 2008, the day before the scheduled closing. The Court concluded by finding that the contract for the sale of the property was contingent upon the purchaser arranging for financing "confers upon the purchaser a duty to use reasonable efforts to obtain such financing." The Court also noted that whether the purchaser's efforts to obtain financing were reasonable was a question of fact, and found that defendant's efforts were insufficient to demonstrate a good faith attempt to secure the necessary financing. The Court described defendant's efforts as "woefully short", and that the Court did not need to address the question of whether defendant properly terminated the contract.

The Court ordered the $20,000.00 in earnest money paid by defendant should be credited toward the damages, and that plaintiff should receive that money plus the additional $36,541.00 in damages she claimed, and also found that plaintiff's claim for attorney's fees was reasonable, and awarded fees of $23,742.50.

Defendant has appealed, and the issue is:

> Did the Trial Court err in finding that defendant failed to make reasonable efforts to secure the necessary financing, in violation of the covenant of good faith and fair dealing?

The question of whether the buyer's efforts to obtain necessary financing are reasonable is a question of fact. *Educational Placement Services, Inc. v. Watts,* 789 S.W.2d 902 (Tenn.Ct.App.1989). Thus, the Trial Court's finding on this issue comes to us with a presumption of correctness, unless the evidence preponderates against this finding. Tenn. R.App. P. 13.

The agreement in this case was conditioned on the defendant's ability to obtain a loan for 100% of the purchase price. The agreement states the buyer will make application for the loan within five days of the binding agreement date, and will pursue approval diligently and in good faith. Plaintiff, a real estate agent herself, accepted the terms of the contract, including the contingency that defendant would have to obtain 100% financing.

The Trial Court found that defendant did not act diligently to pursue the necessary financing, and that he only made one inquiry within the five day period, which was an "informal telephonic preliminary application" with SunTrust, and concluded that defendant's efforts did not comport with the implied covenant of good faith and fair dealing.

A review of all of the evidence in this case shows, however, that defendant did, through his agent, Ms. Grissom, apply to four different lenders for 100% financing, only to learn that SunTrust was the only lender who actually offered such programs. A representative at Wells Fargo testified that she spoke to defendant by phone, but told him that they had no program by which they could loan 100% of the purchase price. Defendant then made an application by phone with SunTrust, who did offer 100% financing, and the SunTrust representative testified that the telephonic application was considered a formal loan application even though it was not signed.

*3 She testified that SunTrust had two programs which offered 100% financing, one of which was for doctors, and the other for persons with very high incomes. She testified that defendant could not qualify for the physician program, because he was a dentist and not a doctor. She testified that she then tried to qualify him under the high income loan, and asked him for his tax returns, which he provided. She testified that after she received the tax returns, she tried to qualify him for the high income loan, but he could not qualify. She testified that she let defendant and his realtor know that he did not qualify on June 27, and then faxed a denial letter to the realtor on June 27.

The evidence also showed that at some point prior to June 21 (while the application with SunTrust was still pending), defendant also made an application with Lending Tree via the internet, and then was contacted by and met with Mr. Heffington, who testified that he made inquiry to at least 6 or 7 lenders about obtaining 100% financing for defendant, only to learn that it was not offered by any of them. Contrary to the Trial Court's findings, the proof preponderates that the defendant and others acting on his behalf made inquiries to almost a dozen lending institutions, only to learn that SunTrust was the only institution who offered any 100% financing programs. The evidence showed that defendant formally applied for financing through SunTrust and supplied

all the necessary information, including his tax returns, but could not qualify for 100% financing due to his income level. The denial letter from SunTrust shows that financing was denied solely due to insufficient income, and not because the application or documentation was somehow lacking, as the Trial Court's Opinion suggested.

Both parties in this case rely on our Opinion in *Hudson v. Head,* 1995 WL 555638 (Tenn.Ct.App. Sept. 21, 1995). In *Hudson,* the Court was asked to determine whether buyers should have been refunded their earnest money and given their attorney's fees when they failed to close on a real estate contract because they could not obtain the necessary financing to satisfy the financial contingency. *Id.* Pursuant to the contract, the sale was contingent upon the buyers being able to obtain financing (with no certain terms) and the buyers were to "immediately apply for the necessary mortgage loan". *Id.* The proof showed that the buyers called several lending institutions to inquire generally about rates and terms, and then went to Home Federal to speak to a loan officer, where they were allegedly told that they could not be approved until they sold their existing homes, and that they should not apply until they had done so because the bank only had a lock-in period of 45 days. *Id.* The buyers testified that they put one existing home on the market, and waited to fill out the loan application until closer to the closing date. *Id.* The buyers only filled out one application for a loan, after waiting 3 months to do so, and were approved only if they could sell their existing homes (which did not occur by the scheduled closing date). *Id.*

*4 This Court found that such actions by the buyers were not reasonable and showed that the buyers did not act in good faith. *Id.* There was some testimony that the buyers were not concerned because they knew they could "get out of" the contract. *Id.* We ruled that the sellers would keep the earnest money and the buyers would pay their own attorney's fees. *Id.* The Court relied on the same ALR annotation relied upon by the Trial Court in this case, wherein it is stated:

> Because the question of sufficiency of effort clearly depends upon the facts, or what the purchaser actually did, the attorney representing the purchaser must be prepared to marshal as extensive an array of loan applications and rejections from as many different financing sources as possible in order to show the client's effort and its lack of success. This applies equally to the attorney representing a buyer who sincerely tried and was unable to arrange financing, and the attorney whose client decided he did not desire to go through with his purchase of the property....

*Id., quoting Annotation, Sufficiency of Real–Estate Buyer's Efforts to secure Financing Upon Which Sale is Contingent,* 78 A.L.R.3d 880, 884 (1977).

As the *Hudson* court noted, in these cases the outcome depends on the facts in the given case. In this case, there is no suggestion that defendant was merely trying to "get out" of the contract by not making the effort to obtain financing, as was suggested in *Hudson.* This defendant clearly sought financing with multiple lending institutions, and was unable to get financing on the terms specified in the contract. It therefore appears that any further inquiries or applications would, indeed, have been futile. *See also Vonkrosigk v. Rankin,* 2000 WL 1483209 (Tenn.Ct.App. Oct. 10, 2000)(buyer was shown to have acted in good faith to obtain financing, where she made only one application, and was denied due to her high debt to income ratio); *Dowd v. Canavan,* 2009 WL 2341522 (Tenn.Ct.App. July 30, 2009)(buyers only applied to two banks but this was found to be sufficient and buyers acted in good faith).

The evidence preponderates against the Trial Court's findings of fact regarding the reasonableness of defendant's efforts to obtain financing in this case. Defendant demonstrated that he sought 100% financing from multiple institutions, and was denied either because such financing was unavailable or because he did not qualify. We reverse the Judgment of the Trial Court and remand for determination whether the contract was properly terminated, a question which the Trial Court pretermitted.

The cost of the appeal is assessed to plaintiff, Elizabeth C. Wright.

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1998 WL 1297690
Only the Westlaw citation is currently available.
United States District Court, W.D.
Tennessee, Eastern Division.

James L. NELSON, et al., Plaintiffs,
v.
TENNESSEE GAS PIPELINE COMPANY, et al., Defendants.

No. 95–1112. | Aug. 31, 1998.

**Attorneys and Law Firms**

Gordon W. Jenkins, Idaho Falls, Idaho, Carl R. Ogle, Jr., Jefferson City, Tennessee, Joseph D. Davis, Los Angeles, California, for Plaintiffs.

Walter H. Crouch, William H. Farmer, Nashville, Tennessee, Russ M. Strobel, Chicago, Illinois, for Defendants.

Before: J. DANIEL BREEN, United States Magistrate Judge.

**Opinion**

**ORDER GRANTING DEFENDANTS' MOTIONS TO EXCLUDE EXPERT TESTIMONY**

BREEN, Magistrate J.

*1 Before the court are the motions of defendants, Tennessee Gas Pipeline Company, et al. (hereinafter sometimes referred to as "Tenneco"), to exclude from the trial of this matter the testimony of plaintiffs' experts Kaye Kilburn, M.D. and Alan Hirsch, M.D. This lawsuit was filed by numerous individuals who have lived or spent significant amounts of time within close proximity to defendants' natural gas pipeline compressor station located in Lobelville, Tennessee. According to plaintiffs, Tenneco, over a period of several years, released toxic substances, including poly-chlorinated biphenyls ("PCBs") into the soil, groundwater, and atmosphere in the vicinity of the pumping station, as well as into Marrs Branch Creek, which flows along defendants' property, causing various injuries to plaintiffs. Specifically, plaintiffs allege that Tenneco used chemicals including Pydraul AC, a lubricating oil containing a type of PCB known as Aroclor 1254, as a fire retardant in the crankcase and cylinder lubricating system of the starting air compressors at the Lobelville pumping station as well as at 35 other compressor stations along the 10,000–mile pipeline. As a result, plaintiffs charge, they have suffered from immune and nervous system impairments, bone degeneration, and related learning disorders. Plaintiffs have brought this action under the theories of negligence, trespass, common law nuisance, and strict liability.

The instant motions were filed April 16, 1998. Plaintiffs have opposed the motions and Tenneco has replied to the motion concerning Dr. Kilburn. None of the parties have requested a hearing on this matter, but have submitted voluminous exhibits in support of their positions. Thus, the court will determine the admissibility of these experts' testimony based on the parties' submissions.

Defendants seek to exclude the testimony of Drs. Kilburn and Hirsch on the grounds that the proffered testimony does not meet the standards set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc .*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). In *Daubert,* the Supreme Court concluded that the former "general acceptance" test governing the admissibility of scientific evidence articulated in *Frye v. United States,* 54 App. D.C. 46, 293 F. 1013 (1923) was superseded by the adoption of Rule 702 of the Federal Rules of Evidence.[1] *Daubert,* 509 U.S. at 589, 113 S.Ct. at 2794. The Court explained that

> the [displacement of the] Frye test ... by the Rules of Evidence does not mean, however, that the Rules themselves place no limits on the admissibility of purportedly scientific evidence. Nor is the trial judge disabled from screening such evidence. To the contrary, under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.
>
> The primary locus of this obligation is Rule 702, which clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" an expert "may testify thereto." The subject of an expert's testimony must be scientific ... knowledge." The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. The term "applies to any body of known facts or to any body of ideas inferred from such facts or accepted

> as truths on good grounds." Of course, it would be unreasonable to conclude that the subject of scientific testimony must be "known" to a certainty; arguably, there are no certainties in science. But, in order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation —i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

***2** Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a) [Fed.R.Evid.], whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

*Id.* at 589–93, 113 S.Ct. at 2794–96 (internal citations omitted). The requirement that the expert's conclusions be based on "good grounds" applies to each step of his analysis. *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 743 (3d Cir.1994), *cert. denied sub nom. Gen. Elec. Co. v. Ingram*, 513 U.S. 1190, 115 S.Ct. 1253, 131 L.Ed.2d 134 (1995).

The *Daubert* Court listed certain factors that bear on a court's determination of the validity of an expert's methodology: (1) whether the theory or technique in question can be or has been tested; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) "in the case of a particular scientific technique, ... the known or potential rate or error and the existence and maintenance of standards controlling the technique's operation"; and (4) the general acceptance of the technique. *Daubert*, 509 U.S. at 593–94, 113 S.Ct. at 2796–97 (internal citations omitted). The Court went on to note that

> [t]he inquiry envisioned by Rule 702 is ... a flexible one. Its overarching subject is the scientific validity and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

*Id.* at 594–95, 113 S.Ct. at 2797 (footnotes omitted); *see also Glaser v. Thompson Med. Co., Inc.*, 32 F.3d 969, 972 (6th Cir.1994). In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir.), *cert. denied*, 516 U.S. 869, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995) (*"Daubert II"*), the Ninth Circuit, on remand, added another factor: " 'whether the experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying' because the former 'provides important, objective proof that the research comports with the dictates of good science." ' *Smelser v. Norfolk S. Ry. Co.*, 105 F.3d 299, 303 (6th Cir.), *cert. denied*, ___ U.S. ___, 118 S.Ct. 67, 139 L.Ed.2d 29 (1997) (citing *Daubert II*, 43 F.3d at 1317). "These factors are to assist the court in determining whether the analysis undergirding the experts' testimony falls within the range of accepted standards governing how scientists conduct their research and reach their conclusions." *Id.* at 303 (citations and internal quotations omitted). Thus, an expert opinion based on valid scientific methodology will satisfy Rule 702, while a "subjective belief or unsupported speculation" will fail. *Id. Daubert* requires that the plaintiffs in this case establish by a preponderance of the evidence that the proffered testimony meets the standards of scientific reliability set forth therein. *Daubert*, 509 U.S. at 592, 113 S.Ct. at 2796; *see also Smelser*, 105 F.3d at 303.

***3** The requirement that the proffered testimony "assist the trier of fact" was described by the Court in *Daubert* as one of "fit." *Daubert*, 509 U.S. at 591, 113 S.Ct. at 2796. Testimony based on theories that do not fit the facts of the case are not helpful to the trier of fact. *See id.*

"[W]hile [Rule 702] allow[s] district courts to admit a somewhat broader range of scientific testimony than would have been admissible under Frye, [it] leave[s] in place the 'gatekeeper' role of the trial judge in screening such evidence." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, ___, 118 S.Ct. 512, 517, 139 L.Ed.2d 508 (1997). In *Turpin v. Merrell Dow Pharmaceuticals, Inc.*, 959 F.2d 1349, 1352 (6th Cir.), *cert. denied*, 506 U.S. 826, 113 S.Ct. 84, 121 L.Ed.2d 47 (1992), the Sixth Circuit, in an opinion authored by then Chief Judge Merritt, instructed courts to take a "hard look" at the expert's basis for his scientific opinion. As the court stated, "close judicial analysis of such technical and specialized matter is necessary not only because of the likelihood of juror misunderstanding, but also because expert witnesses are not

necessarily always unbiased scientists." *Turpin,* 959 F.2d at 1352.

With these principles in mind, the court will address defendants' motions in turn.

### *KAYE H. KILBURN, M.D.*

Dr. Kilburn's credentials are impressive. He is a professor of medicine at the University of Southern California School of Medicine and director of its environmental sciences lab and has been widely published. In connection with this case, Dr. Kilburn studied seven flagship plaintiffs: James Lonnie Nelson, Fred Junior Nelson, Betty Jean Nelson, Sally Sue Nelson, Lucy Louise Gray, Betty Joan Watkins, and Mary Jo Phebus. Each subject completed a toxic exposure questionnaire and was exposed to a battery of clinical tests designed to reveal brain and pulmonary abnormalities. The questionnaires sought information concerning the subjects' personal data, education and socioeconomic level, occupation, exposures to certain types of chemical agents, general medical history, and use of alcohol, tobacco, and drugs. The clinical testing consisted of evaluations of reaction time, balance, blink reflex, grip strength, color vision, contrast sensitivity, visual field, intelligence, recall, vocabulary, memory, moods, vibration senses, dexterity, and expiration. Dr. Kilburn then compared plaintiffs' responses to the questionnaire and test results with those of a control group from another Tennessee community not exposed to PCBs. Members of the control group were selected to match the plaintiffs with respect to age, sex, race, and education.

Based upon his evaluations, Dr. Kilburn opined that, more probably than not, each of the flagship plaintiffs suffered from encephalopathy, or disorders of the brain, due to PCB exposure from the defendants' facility. He further found that five subjects suffered from various levels of airway obstruction also caused, at least in part, by PCBs and, in some cases, dibenzofurans, expelled by Tenneco. In addition, he opined that plaintiff James Lonnie Nelson suffered from psychomotor epileptic seizures, cutaneous cancer, and choracne, all of which he testified in deposition were caused by PCB exposure.

*4 Using similar methodology, Dr. Kilburn conducted an epidemiological study, upon which he also relies, which included the seven flagship plaintiffs and 91 other individuals from Lobelville, the results of which were set forth in a paper entitled "Visual and Neurobehavioral Impairment Associated with Polychlorinated Biphenyls (PCBs) From a Natural Base Pipeline." Dr. Kilburn compared these 98 subjects to 58 unexposed referents. Comparisons revealed abnormalities in the 91 Lobelville subjects similar to those found in the seven flagship plaintiffs. Specifically, Dr. Kilburn found that the Lobelville residents suffered from impaired reaction times, balance, vision, hearing, and diminished vigor and had higher levels of tension, depression, anger, fatigue, confusion, headache, lightheadedness, irritability, mood swings, phlegm, shortness of breath, and wheezing than the unexposed group. (App. to Defs.' Mem. in Supp. of their Mot. to Exclude Kaye Kilburn, M.D. (hereinafter referred to as "App. I"), Exh. 3 at Bates stamp nos. KIL000721–24.) He concluded that "[p]rolonged residential exposure to PCBs since the mid–1950's was associated with severe visual defects and impaired neurophysiologic and neuropsychologic functions ." (App. I, Exh. 3 at p. 3.)

In support of their motion to exclude Dr. Kilburn's testimony, defendants argue that the expert's opinions, and the methodology from which they are derived, are not scientifically valid. Dr. Kilburn's study of the flagship plaintiffs can best be categorized as a "cohort" study. In a cohort epidemiological study, exposure to a particular agent is utilized as the independent variable between two groups. One group is made up of persons who have been exposed to a substance that is suspected of causing disease and the other, the control group, has not been exposed. Reference Manual on Scientific Evid. at 134–36 (1994). The weakness of the cohort study design is that "an increased risk of disease among the exposed group may be caused by agents other than the exposure." *Id.* at 135. Thus, the researcher must "identify factors other than the exposure that may be responsible for the increased risk of disease." *Id.* The consideration of so-called "confounding factors" is of particular importance in determining whether there is indeed a causal relationship between exposure to a substance and injury. *Id.* at 157.

While Tenneco has pointed to numerous shortcomings in Dr. Kilburn's methodology, the most glaring, and fatal in the court's opinion, is Dr. Kilburn's failure to consider confounding factors for the alleged injuries. In his deposition, Dr. Kilburn stated that alcohol was the most common cause of encephalopathy. (App. I, Exh. 2 at p. 45.) He also identified numerous other causes, including solvents (*id.* at p. 46), cocaine and heroin abuse (*id.* at pp. 57–58), spray paint (*id.* at pp. 62–63), and living in a mobile home or low-cost housing (*id.* at pp. 67–71). He further opined in his reports on the

flagship plaintiffs that depression suffered by some of them was caused by exposure to PCBs.

*5 In his study, Kilburn stated that "[n]o competing chemical exposure, confounding factors or other attributable causes were found ..." (*Id.*) He further noted in his report on flagship plaintiff Mary Jo Phebus that there were "no competing causes" of her encephalopathy and airway obstruction. The voluminous exhibits submitted to the court in this case are replete, however, with evidence of other factors or agents which, according to Dr. Kilburn's own testimony, may have been responsible for the symptoms suffered by the flagship plaintiffs—evidence which, it appears, Dr. Kilburn utterly ignored.

Plaintiff James Lonnie Nelson stated on his toxic exposure questionnaire that he had occupation exposure to spray paint (App.I, Exh. 5–15) and solvents (App. I, Exh. at 5–28). Nelson's medical records and deposition testimony revealed that he consumed large amounts of alcohol and had been a cocaine and heroin user (App. I, Exh. at 5–46 to 50), that he had been sexually abused as a child and had attempted suicide with a shotgun following a marital dispute (App. I, Exh. 5–45, 5–53 to 56), and that he had lived in a mobile home (App. I, Exh. 5–63 to 64.) Dr. Kilburn testified that there was no explanation for Nelson's depression other than PCB exposure.

Deposition testimony and medical records of the remaining flagship plaintiffs reveal the existence of other factors articulated by Dr. Kilburn as causes of encephalopathy. Fred Junior Nelson was also sexually abused as a child, for which he was treated for depression, and was an alcohol abuser. Betty Nelson's medical records indicated cocaine and alcohol abuse. Lucy Gray lived in a trailer for many years, as did Betty Watkins. Watkins' medical records stated that she had been treated for depression. Finally, Dr. Kilburn noted in his report on Mary Jo Phebus that her depression was "elevated," which he attributed, along with her other abnormalities, solely to PCB exposure. In her deposition, however, she reported that she had been treated for depression following her mother's suicide on her twenty-second birthday.

There are similar problems with Dr. Kilburn's association of the flagship plaintiffs' airway obstruction to PCB contamination. Dr. Kilburn testified in deposition that cigarette smoking is the primary cause of airway obstruction. (App. I, Exh. 2 at p. 460.) Working with textiles, according to Dr. Kilburn, can also cause airway problems. (App. I, Exh. 2 at p. 618.) According to the record, Betty Nelson had worked in a textile factory. Dr. Kilburn admitted in his deposition that he could not say the small airway obstruction from which she suffered could not have been caused by her occupational exposure. (App. 1, Exh. 2 at p. 619.) Betty Nelson also smoked ten cigarettes per day for 20 years. In his report on Lucy Gray, Dr. Kilburn attributed her severe airway obstruction solely to PCBs, in spite of her admission in the toxic exposure questionnaire that she had smoked 70 cigarettes per day for 18 years. Sally Sue Nelson and Betty Watkins were employed as textile workers. Betty Watkins also stated in her questionnaire that she had smoked 20 cigarettes per day for 21 years. In his first report, Dr. Kilburn opined that Watkins' small airways obstruction was caused by PCBs and smoking. In a second report, he pointed to PCBs as the sole cause of her symptoms. Dr. Kilburn first reported that the airway obstruction suffered by Mary Jo Phebus was caused by PCBs and cigarette smoking, which she indicated amounted to some 20 cigarettes per day for 25 years. In his second report, he listed PCB exposure as the sole cause of her airway obstruction.

*6 There is simply no basis for Dr. Kilburn's assumption that PCBs, and not one of numerous other factors, was the cause of plaintiffs' reported maladies. Tenneco makes much of the fact that Dr. Kilburn failed to consult the medical records of the plaintiffs prior to making his assessments. Although such failure does not in itself mandate a finding that the studies performed by this expert were unreliable, *see Laski v. Bellwood,* No. 96–2188, 1997 WL 764416, at * 4 (6th Cir. Nov. 26, 1997), the court notes that a review of the plaintiffs' records would have been the most useful and reliable tool from which Dr. Kilburn could have obtained insight into possible alternate causes of their illnesses. *See Eggar v.. Burlington N. R.R. Co.,* Nos. CV–89–159, 170, 179, 191, 236, 291, 1991 WL 315487, at * 10 (D.Mont. Dec. 18, 1991), *aff'd sub nom. Claar v. Burlington N. R.R. Co.,* 29 F.3d 499 (9th Cir.1994). The record shows that he has failed to engage in adequate techniques to rule out alternative causes and offers no good explanation for why his opinion is nevertheless reliable in light of the other potential causes of the alleged injuries. *See In re Paoli R.R. Yard,* 35 F.3d at 760; *see also Conde v. Velsicol Chem. Corp.,* 24 F.3d 809, 814 (6th Cir.1994) (holding insufficient showing of causation where expert testimony failed to rule out other causes).

It also appears to the court that Dr. Kilburn failed to consider the temporal relationship between exposure to PCBs in Lobelville and some of the plaintiffs' reported maladies. According to the Reference Manual on Scientific Evidence,

"[a] temporal or chronological relationship must exist for causation. If an exposure causes disease, the exposure must occur before the disease develops. If the exposure occurs after the disease develops, it cannot cause the disease." Reference Manual on Scientific Evid. at 162. The court notes that the expert admitted in his deposition that neither the questionnaires completed by the flagship plaintiffs nor his reports indicated the onset date of their illnesses. (App. I, Exh. 2 at p. 98.) Further, Dr. Kilburn stated in deposition that low educational achievement among the residents of Lobelville and the flagship plaintiffs, with the exception of perhaps one or two, was more likely than not caused by PCB exposure (*id.* at pp. 359, 365), even though, according to the record, five of the seven flagship plaintiffs had difficulties in school prior to moving to Lobelville.

The court also notes that Dr. Kilburn failed to establish that the flagship plaintiffs actually received a dose of PCBs from the Tenneco pumping station sufficient to make them ill. One of the three central tenets of toxicology is that "the dose makes the poison." Reference Manual on Scientific Evid. at 185. A dose-response relationship is, while not necessary to infer causation, a factor to be considered in determining the existence of a causal relationship. *Id.* at 160–64. In this case, Dr. Kilburn admitted in deposition that he made no attempt to determine the dose received by any of the 98 Lobelville residents tested or to determine the existence of a dose-response relationship. He has been perfectly willing to assume that plaintiffs had a sufficient dose of PCBs to cause their illnesses and to give an opinion devoid of any information concerning dosage. An appropriate methodology requires evidence from which the trier of fact could conclude that the plaintiff was exposed to levels of toxin sufficient to cause the harm complained of. *See Wintz v. Northrop Corp.*, 110 F.3d 508, 513 (7th Cir.1997) (citing Reference Manual on Scientific Evidence); *Wright v. Willamette Indus., Inc.*, 91 F.3d 1105, 1107 (8th Cir.1996). Defendants' experts, Phillip S. Guzelian, M.D. and Robert C. James, Ph.D., have submitted credible opinions to that effect. (Defs.' Reply Mem. in Supp. of their Mot. to Exclude Kaye Kilburn, M.D., Exh. C at p. 8.)

*7 As the court has previously observed, general acceptance in the scientific community remains a factor to be considered by the court in passing on the admissibility of an expert opinion. It appears that the opinions expressed by Dr. Kilburn are "novel," to say the least, and do not enjoy general acceptance. Indeed, his paper prepared in connection with his study of the Lobelville residents concluded with the following statement: "[T]his paper may be the first to show unequivocally central nervous system effects of PCBs." (App. I, Exh. 3 at Bates stamp no. KIL 000728.) When asked in deposition if he was aware of any scientific literature supporting the position that PCB exposure could cause what he has characterized as encephalopathy, Dr. Kilburn first replied as follows: "Almost every study made of populations finds mental complaints. I think they are headaches, peripheral nervous system complaints and general complaints. I think they are evidence that if testing had been done encephalopathy is there and would be discoverable." (App. I, Exh. 2 at p. 485.) He referred specifically to his own paper prepared in connection with this case and to two others also authored by him, indicating that they "show that applying the testing shows the effects." (*Id.*) He also pointed to other scientific literature, stating that "I think if they use similar methods they would come up with similar data from which they would probably draw somewhat the same conclusions." (*Id.* at 487 .) When asked a second time whether he knew of any scientific literature to support his opinion that PCBs can cause encephalopathy, he simply responded "no." (*Id.*)

A review of the studies mentioned by Dr. Kilburn, other than his own, reveals no support for his position. The studies performed by Joseph and Sandra Jacobson, as well as the Yu, Hsu, Gladen & Rogan study, related to the effects of prenatal PCB exposure. Such prenatal effects on children were described as "modest" and "subtle" and there was "no evidence of mental retardation or gross impairment." (App. I, Exh. 23–4 at Bates stamp no. KIL 000938 .) Another noted that the effects of prenatal exposure "may persist well into childhood." (App. I, Exh. 23–6 at Bates stamp no. KIL 000947.) Of the flagship plaintiffs, only one—Mary Jo Phebus—was born in Lobelville after Tenneco began using PCB-based products. As she was born within two years thereof, it is unlikely, according to defendants' expert Robert James, that the substance, whose environmental transport is slow, could have leached from Tenneco's 50–acre property quickly enough to have had a prenatal effect on her. (App. 1, Exh. 13 at p. 2.)

Moreover, studies involving the much more highly toxic polychlorinated dibenzodioxins ("PCDDs") and polychlorinated dibenzofurans ("PCDFs"), or the Yusho poisoning in Japan, the primary causative agent in which was determined to be PCDFs, likewise lack the necessary "fit" to be of assistance to the trier of fact in this litigation. The expert admitted in his deposition that he knew of no

evidence of the presence of PCDDs or PCDFs in this case, but merely assumed those agents to be present because it was "the most plausible way of explaining the evidence that we have ..." (*Id.* at p. 373.) The study on the relationship between chloracne and 2,3,7,8–tetrachlorodibenzo–p–dioxin ("TCDD"), but failed to mention PCBs, is not relevant because there is no evidence that plaintiffs were exposed to TCDD. The Neal study, which focused on the mechanisms of toxicity of PCDDs and TCDDs, is likewise unsupportive, as is the Poland–Greenlee–Kende study on TCDDs. Courts have found that extrapolation from studies of chemicals different from those at issue does not rise to the level of accepted methodology. *See Schudel v. Gen. Elec. Co.,* 120 F.3d 991, 996–97 (9th Cir.1997), *cert. denied,* ____ U.S. ____, 118 S.Ct. 1560, 140 L.Ed.2d 792 (1998). Kimbrough's animal study on PCBs, PBBs, and related compounds, which makes no mention of an association between PCBs and central nervous system or pulmonary problems, also fails to support Dr. Kilburn's opinions. Similarly, Safe's paper on the health impacts of PCBs does not associate the substance with adult central nervous and pulmonary illness. Experts may not rely on studies that do not address the types of diseases at issue. *See Christophersen v. Allied–Signal Corp.,* 939 F.2d 1106, 1115–16 (5th Cir.1991), *abrogated on other grounds, Daubert.; Valentine v. Pioneer Chlor Alkali Co., Inc.,* 921 F.Supp. 666, 673–74 (D.Nev.1996). Excerpts from the Philp text provided to the court are too generalized to be of any value here. The Reggiani and Bruppacher paper noted increases in the prevalence of subjective neurologic symptoms such as a headaches, dizziness, and fatigue, but stated that such symptoms "were so frequent in control subjects that they were of little significance to the clinician." (App. 1, Exh. 23–18 at Bates stamp no. 230.) The paper also observed impressive respiratory findings at high levels of exposure but also noted a high number of confounding influences. (*Id.*)

***8** In addition, Dr. Kilburn could point to no scientific literature to support his view that PCBs caused depression, stating only that "[i]t doesn't make an iota of sense to consider that depression can be treated with chemicals unless it were also caused by chemicals." (App. I, Exh. 2 at p. 519.) He further conceded that, while the tests administered by him to the flagship plaintiffs and the residents of Lobelville could reveal brain damage, they were incapable of identifying the specific cause of the brain damage. (*Id.* at p. 110.) Furthermore, Dr. Kilburn admitted in his deposition that he was aware of no scientific literature indicating that PCBs caused the psychomotor epilepsy and skin cancer suffered by James Lonnie Nelson. (*Id.* at pp. 482–83.)

The plaintiffs appear to concede that their expert is weak as to the general acceptance factor but tempt the court with the old adage that "there has to be a first time for everything." The court is unpersuaded. While this factor is not dispositive, the Court in *Daubert* noted that "[w]idespread acceptance can be an important factor in ruling particular evidence admissible, and a 'known technique which has been able to attract only minimal support within the community' may properly be viewed with skepticism." *Daubert,* 509 U.S. 594, 113 S.Ct. at 2797 (internal citations omitted). The Court also recognized that, although the flexible test articulated in *Daubert* would sometimes "prevent the jury from learning of authentic insights and innovations," the Rules of Evidence were designed "not for the exhaustive search for cosmic understanding" but for the resolution of disputes. *Id.* at 597, 113 S.Ct. at 2798–99.

The court further notes that Dr. Kilburn's epidemiological study of the Lobelville residents has not been published or peer reviewed. In his deposition, Dr. Kilburn stated that the paper prepared in connection with his assessment of the Lobelville residents had been submitted for publication and was in the process of being peer reviewed. As the Court observed in *Daubert,*

> [p]ublication ... is not a sine qua non of admissibility; it does not necessarily correlate with reliability ... But submission to the scrutiny of the scientific community is a component of "good science," in part because it increases the likelihood that substantial flaws of methodology will be detected. The fact of publication (or lack thereof) in a peer reviewed journal thus will be a relevant, though not dispositive, consideration in assessing the scientific validity of a particular technique or methodology on which an opinion is premised.

*Id.* at 593–94, 113 S.Ct. at 2797.

In addition, the fact that the study was performed in connection with litigation and funded by plaintiffs' counsel does not militate in Dr. Kilburn's favor. In *Daubert II,* the Ninth Circuit found particularly significant the question

of whether the expert had developed his conclusions as a result of independent research or for purposes of litigation testimony, finding that testimony provided by an expert based on legitimate, preexisting research unrelated to a lawsuit provided the "most persuasive basis for concluding that the opinions [expressed] were derived by the scientific method." *Daubert II,* 43 F.3d at 1317 (internal quotations omitted). Where the proffered testimony did not arise from independent research, the court required the party seeking admission of the evidence to "come forward with other objective, verifiable evidence that the testimony is based on scientifically valid principles." *Id.* at 1317–18 (internal quotations omitted).

***9** Dr. Kilburn's deposition testimony and portions of his written work submitted by Tenneco suggest that he is a strong opponent of the use of chemicals. Expert opinions are about science, however, not advocacy. Based on the entire record in this case, Dr. Kilburn's studies suffer from significant methodological flaws. Moreover, his opinions are completely unsupported by any scientific research outside the litigation context. While "[t]rained experts commonly extrapolate from existing data[,] ... nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the ipse dixit of the expert." *Joiner,* 522 U.S. at ___, 118 S.Ct. at 519. In this case, as in *Joiner,* "there is simply too great an analytical gap between the data and the opinion proffered." *Id.* (citing *Turpin,* 959 F.2d at 1360). Dr. Kilburn's opinions are based upon nothing more than conjecture, speculation, and litigation animus. Other courts have discussed Dr. Kilburn's methodology and expert testimony and have found them wanting for reasons similar to those stated herein. *See Valentine* (excluding Dr. Kilburn's testimony on the grounds that his conclusions were not derived from acceptable scientific methodology); *Horne v. Pioneer Chlor Alkali Co., Inc.,* No. CV–S–93–1060 (D.Nev. Mar. 4, 1996) (same); *Thomas v. FAG Bearings Corp., Inc.,* 846 F.Supp. 1400 (W.D.Mo.1994) (finding Dr. Kilburn's study irrelevant and inadmissible); *Lofgran v. Motorola, Inc.,* No. 93–CV–05521 (Ariz. June 1, 1998) (Dr. Kilburn's opinions not based on acceptable scientific methodology).

Although plaintiffs have urged the court to permit the jury to determine the weight to be accorded to Dr. Kilburn's testimony, the court must decline. This court is reminded of its "gatekeeping" role and of the Supreme Court's admonition in *Daubert* that, in passing on a proffer of expert testimony, the trial judge must be mindful of all applicable rules of evidence. *Daubert,* 509 U.S. at 595, 113 S.Ct. at 2797. In particular, the Court referred to Fed.R.Evid. 403, which permits exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury...." Fed.R.Evid. 403. The *Daubert* opinion also quoted Judge Weinstein, who cautioned that

> [e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative proof under Rule 403 of the present rules exercises more control over experts that over lay witnesses.

*Id.* at 595, 113 S.Ct. at 2798.

As the court finds that, based on the foregoing, Dr. Kilburn's proffered testimony is not grounded on methodology that is scientifically valid, will not assist the trier of fact, and is likely to mislead the jury, defendants' motion to exclude his testimony is GRANTED.

### *ALAN R. HIRSCH*

***10** Plaintiffs have also proffered the testimony of Alan R. Hirsch, M .D., a neurologist, who proposes to testify that the flagship plaintiffs suffer from various conditions as a result of their exposure to PCBs. Dr. Hirsch examined the seven flagship plaintiffs, took medical histories, performed cognitive tests. In reports issued on each of the plaintiffs, he opined that all suffered from encephalopathy, four from polyneuropathy (peripheral nerve dysfunction), three from cephalgia (headaches), one from hyposmia (reduced ability to smell), two from hypogeusia (reduced ability to taste), one from optic neuropathy (optic nerve dysfunction), one from autonomic neuropathy (autonomic nervous system dysfunction), and one from phantosmia (hallucinating a smell). According to Dr. Hirsch's reports, the cause of all of these illnesses, more likely than not, was exposure to PCBs and "associated chemicals."

Defendants first argue that plaintiffs have failed to establish that Dr. Hirsch is "qualified as an expert by knowledge, skill, experience, training, or education" in accordance with Rule 702. *Daubert* requires that plaintiffs establish Dr. Hirsch's expert qualification by a preponderance of the evidence. According to his curriculum vitae, Dr. Hirsch

is board certified in neurology and psychiatry. He has written papers on neurotoxicity resulting from ambient chemicals, neurotoxicity and cephalgia from acute nitrogen tetroxide exposure, and neurotoxicity from landfill exposure. Numerous articles have been published and presentations made by Dr. Hirsch on smell, taste, and headaches. In deposition, the expert testified that he was exposed to the principles of toxicology in connection with medical school courses on other subjects and had some clinical experience with environmental toxins during his residency. In addition, he has examined individuals in connection with two other toxic tort cases, one of which involved PCBs. He conceded that he had conducted no research and had written no articles concerning PCB exposure.

In support of their argument that Dr. Hirsch is unqualified to give expert testimony in this case, defendants cite three cases: *Mancuso v. Consol. Edison Co.,* 967 F.Supp. 1437 (S.D.N.Y.1997); *Diaz v. Johnson Matthey, Inc.,* 893 F.Supp. 358 (D.N.J.1995); and *Wade–Greaux v. Whitehall Labs, Inc.* 874 F.Supp. 1441 (D.V.I.), *aff'd,* 46 F.3d 1120 (3d Cir.1994). In both *Mancuso* and *Diaz,* the court noted that the qualification requirement of Rule 702 is to be interpreted liberally and that exclusion is improper simply because an expert does not have the most appropriate degree of training. *Mancuso,* 967 F.Supp. at 1442 (citing *In re Paoli R.R. Yard,* 35 F.3d at 741); *Diaz,* 893 F.Supp. at 372 (same). The experts in these cases were found unqualified to testify largely on the grounds that their experience in toxicology relative to the substances at issue was limited to the review of selected literature for the purposes of the litigation in which their testimony was being proffered. *Mancuso,* 967 F.Supp. at 1443; *Diaz,* 893 F.Supp. at 372; *Wade–Greaux,* 874 F.Supp. at 1476–77. Dr. Hirsch's experience is somewhat broader than that of the experts excluded in the cited cases and, thus, the court finds, under a liberal interpretation of Rule 702, that he satisfies the requirements of expert qualification in this matter.

*11 The court further concludes, however, that Dr. Hirsch's opinions are not based on valid scientific knowledge. This court is required under *Daubert* to ascertain whether Dr. Hirsch arrived at his conclusions using scientific methods and procedures or whether they are mere subjective beliefs or unsupported speculation. *See Claar,* 29 F.3d at 502. It is painfully clear that Dr. Hirsch's opinions proffered in this case fall into the latter category.

An opinion that exposure to a particular substance caused disease is based upon an assessment of the individual's exposure to the toxin and the amount received, the temporal relationship between the exposure and illness, and the subject's exposure to other factors which could also cause illness. Reference Manual on Scientific Evid. at 205. Dr. Hirsch's opinion is completely devoid of any of the foregoing. Rather, he simply made the conclusory announcement at the end of each of his reports that the plaintiffs' diseases were caused by exposure to PCBs. In a declaration submitted as an attachment to plaintiffs' response to the instant motion, Dr. Hirsch stated that the tests administered to the plaintiffs were "standardized diagnostic tests employed by neurologists all around the country to detect impairment of patients' neurological systems." (Pls.' Exhs. in Opp'n to Defs.' Mot. in Limine to Exclude the Test. of Alan Hirsch, M.D., Exh. 1, Decl. of Alan Richard Hirsch, M.D., at p. 4.) He has offered no insight, however, into the reasoning process which led him from his opinion that the plaintiffs suffered from neurological impairments to the opinion that exposure to PCBs was the cause thereof.

As to the amount of exposure and temporal relationship, the essence of Dr. Hirsch's theory of causation, as expressed in his deposition, is that, although he had no knowledge of the intensity of plaintiffs' exposure to PCBs, the substance was found in Lobelville, plaintiffs were in Lobelville, disease was found in the plaintiffs, and, ergo, the degree of exposure must have been sufficient to cause the disease. (App. to Defs.' Mem. in Supp. of their Mot. to Exclude Alan R. Hirsch, M.D. (App.II), Exh. A, at pp. 163–67.) When asked in deposition upon what did he rely for his conclusion that the dose of PCBs received by plaintiffs was high enough to cause their illnesses, Dr. Hirsch replied, "Because that's what they had." (*Id.* at p. 167.) This circular reasoning without basis is improper and has been rejected by other courts. *See Claar,* 29 F.3d at 502–03; *Mancuso,* 967 F.Supp. at 1450, *In re TMI Litig. Cases Consol. II,* 911 F.Supp. 775, 826 (M.D.Pa.1996).

Dr. Hirsch's methodology suffers from another fatal flaw. Like Dr. Kilburn, this expert made no attempt to consider confounding factors. Dr. Hirsch appears to have conducted medical examinations of the plaintiffs and perhaps reviewed their medical records and, thus, was aware of numerous other factors that could have caused their illnesses. In his deposition, Dr. Hirsch conceded that all of the diseases with which he diagnosed the plaintiffs could have been caused by a "host" of other factors, many of which were present in each of the flagship plaintiffs. Nevertheless, with the

exception of notations on James Lonnie Nelson's report that his encephalopathy and polyneuropathy were due to PCB "with possible synergy from drugs and alcohol" (App II, Exh. B–14), he discounted other factors with no explanation whatsoever.

***12** The court would also observe with regard to the basis of Dr. Hirsch's scientific knowledge his statement in deposition that "general symptomology, it's seen with such infrequency that it's usually only seen with PCB." To the extent that the expert's statement suggests that he engaged in some meaningful analysis with respect to causation, it is belied by his sparse experience with PCBs and by his woeful lack of knowledge of the scientific literature on the effects of PCBs, to which the court will next turn.

Dr. Hirsch has failed to point to any scientific literature to support his opinions that exposure to PCBs caused plaintiffs' ailments. In his declaration, he stated that, as a result of his physical examinations and neurological testing, he reached his causation conclusion because "prolonged exposure to PCBs ... is associated with severe neurological damage in the Lobelville plaintiffs, including chemosensory dysfunction, reduced ability to smell and taste, headaches, brain disorders, optic nerve dysfunction, peripheral nerve dysfunction, autonomic nerve dysfunction, and liver disease." *Id.* at p. 4. In his deposition, when asked to identify the scientific literature linking autonomic neuropathy to PCB exposure, he vaguely referred to articles, but could not recall whether they concerned "the Asian exposure or the U.S. workers exposure or the Michigan or North Carolina exposure. I just cannot recall. Or whether it was the firemen exposure." (*Id.* at pp. 189–90.)

With regard to the "U.S. Worker Study," Dr. Hirsch testified that he could not "recall the exact study," but he thought "it was workers who worked amongst transformers or capacitors or something like that." (*Id.* at p. 190.) During the course of the deposition testimony, it became very clear that Dr. Hirsch remembered nothing about the studies or even the decades in which they were conducted. When pressed, he further stated that none of the articles actually said that PCBs caused autonomic neuropathy; rather, they talked about the "same thing using different language" and contained descriptions that "would meet criteria for what [Dr. Hirsch] would call autonomic neuropathy." (*Id.* at pp. 193–96.) He readily conceded that he was aware of no literature concluding that PCBs caused phantosmia (*id.* at p. 197), hypoguesia (*id.* at p. 207), hyposmia (*id.*), or optic neuropathy (*id.* at p. 211).

With regard to polyneuropathy, Dr. Hirsch testified that he had seen an article which might have concluded that PCBs caused the disease but he knew nothing about it other than that the word "polyneuropathy" was used. (*Id.* at pp. 199–202.) As to cephalgia, the expert referred to the same studies noted in connection with autonomic neuropathy but could recall no details, stating only that he drew the conclusion from one of them that cephalgia was caused by PCB exposure. (*Id.* at pp. 202–04.) He pointed to the same studies with regard to encephalopathy but "could not recall that specific word being used." (*Id.* at pp. 211–12.) Plaintiffs have attached to their response to the motion to exclude a "list of the scholarly papers and references on which Dr. Hirsch relied upon reaching his opinions after examination of the plaintiffs." (Pls.' Opp'n to Defs.' Mot. in Limine to Exclude the Test. of Alan Hirsch, M.D. at 9–10.) A mere listing of numerous articles falls short of a reasoned scientific analysis of the methods by which the expert formulated his opinions from the publications cited. *See Eggar,* 1991 WL 315487, at *6. Moreover, the court reminds plaintiffs that it is their responsibility, not that of the court, to sift through the dozens of articles listed in search of materials to support their expert's opinions.

***13** Finally, and briefly, the court notes the existence of two other factors which weigh against admission of Dr. Hirsch's testimony. First, no evidence has been presented that Dr. Hirsch's theories have been published or subjected to peer review. Second, it is clear that Dr. Hirsch's theories were developed solely for the purposes of this litigation. *See Valentine,* 921 F.Supp. at 673 (Dr. Hirsch's failure to have published his novel conclusions or conducted prelitigation research militated in favor of exclusion of his testimony under *Daubert.*)

Accordingly, the court finds that the opinions set forth by Dr. Hirsch are not based on scientific knowledge and would not assist the trier of fact at trial. Therefore, defendants' motion to exclude Dr. Hirsch's testimony is GRANTED.

Footnotes

1 Rule 702 provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

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2012 WL 947106
Only the Westlaw citation is currently available.
United States District Court,
E.D. Tennessee,
Greeneville Division.

In re SOUTHEASTERN MILK ANTITRUST LITIGATION.
This Document Relates to: Food Lion, LLC., et al. v. Dean Foods, et al., No. 2:07–CV 188.

Master File No. 2:08–MD–1000. | March 20, 2012.

**Attorneys and Law Firms**

Salvatore A. Romano, Porter Wright Morris & Arthur, LLP, Washington, DC, for Southeastern Milk Antitrust Litigation.

**Opinion**

***MEMORANDUM OPINION***

J. RONNIE GREER, District Judge.

**1** This matter is before the Court on the retailer plaintiffs' objection to the December 8, 2010 order of the Magistrate Judge, [Doc. 1191], granting in part defendants' motion to exclude the testimony of plaintiffs' expert Professor Luke Froeb, [Doc. 1206]. The defendants have responded to the objection, [Doc. 1229], and plaintiffs have filed a reply, [Doc. 1249][1]. For the reasons which follow, the objection of the plaintiffs is overruled and the Magistrate Judge's order, [Doc. 1191], is AFFIRMED and ADOPTED by this Court and made the order of the Court.

**I. Plaintiffs' Objection to December 8, 2010 Order**

Professor Luke Froeb ("Professor Froeb") is an associate professor of entrepreneurship and free enterprise at Vanderbilt University. Prior to his work at Vanderbilt, he was director of the Bureau of Economics at the Federal Trade Commission and an economist with the Antitrust Division of the Department of Justice. Professor Froeb was retained as an expert witness by plaintiffs to offer opinions on the relevant geographic and product markets and defendants' market power. The defendants moved to exclude Professor Froeb's testimony pursuant to Federal Rule of Evidence 702 and *Daubert v. Merrill Dow Pharm.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

Relying on the undersigned's prior decision concerning Professor Froeb's opinions in the context of the motion of all defendants for summary judgment, [Doc. 461], as the law of the case, the Magistrate Judge granted defendants' motion as to Professor Froeb's opinion as to the relevant geographic markets and market power and denied the motion as to his opinion on the relevant product market, [Doc. 1191]. Plaintiffs now object to that order, arguing that it "suffers from clear errors of both procedure and substance." Plaintiffs seek, alternatively, to have the matter resubmitted to the Magistrate Judge for a *de novo* ruling[2] or for the Court to reconsider the merits of the *Daubert* motion itself.

Although plaintiffs have not sought reconsideration of the Court's summary judgment order[3], they do argue that the Court's finding with respect to Professor Froeb's testimony is "clear error ." Specifically, plaintiffs contest the Court's finding that Professor Froeb's testimony that he used the same methodology that he would have instructed his staff to employ at the FTC or DOJ does not establish "that such methodology is legally acceptable based on existing precedent." They reason that since DOJ and FTC jointly developed the "Horizontal Merger Guidelines," which Professor Froeb purported to use, he therefore used the very "methodology mandated by the Supreme Court precedent." Plaintiffs also criticize the Court for making findings regarding Professor Froeb "without full briefing on the *Daubert* issues that defendants' attack raise."

Rule 72(a) requires the district judge to "consider timely objections and modify or set aside any part of the order [of a magistrate judge] that is contrary to law or clearly erroneous." Fed.R.Civ.P. 72(a); *see also* 28 U.S.C. § 636(d)(1)(A). Plaintiffs' procedural approach to this matter is puzzling. In reality, it is the prior ruling of this district judge which they challenge, not that of the magistrate judge. The magistrate judge did not opine as to the correctness of the district judge's finding; he simply held, and correctly so, that the ruling[4], right or wrong, was the law of the case and that he could not reconsider the ruling. As the plaintiffs properly acknowledge, the "Magistrate Judge did not conduct any independent analysis of Professor Froeb's opinions."

**2** Plaintiffs claim that the undersigned's August 14, 2010 memorandum opinion and order "contains four clear errors of law, stemming from [a] flawed procedure and exacerbated by

defendants' misrepresentations." Those four claimed errors are: (1) the district judge in reality ruled on a *Daubert* motion "without proper notice and inadequate record;" (2) Professor Froeb did consider the necessary "commercial realities" and never admitted he did not do so, contrary to the Court's finding; (3) Professor Froeb did not consider only a "single customer" but properly applied the smallest market principle to all milk purchasers, contrary to the Court's finding; and (4) that Professor Froeb performed his analysis in the same way he would have done it at the DOJ or FDC demonstrates that he applied the correct Sixth Circuit and Supreme Court methodology.

With respect to plaintiffs' objections to the magistrate judge's order, the Court will discuss only the first of these claimed errors in this section, as the others go, not to the merits of the objections, but to the merits of the *Daubert* motion itself which will be discussed below. Plaintiffs rely on *Jahn v. Equine Services,* 233 F.3d 382, 387 (6th Cir.2000) to support their argument that the Court made its rulings with regard to Professor Froeb's testimony "without proper notice and inadequate record." In *Jahn,* a veterinary malpractice case involving the death of a champion Hackney pony, all defendants moved for summary judgment after completion of discovery. The motions turned on causation and the district court, *sua sponte* and without allowing additional briefing, held that the testimony of Jahn's expert veterinarian witness was inadmissible under *Daubert.* Without the testimony, Jahn could not prove causation and summary judgment was granted. Although the Sixth Circuit found substantive reasons for reversing the district court, it also found "that the record was insufficient in order to make a proper *Daubert* determination." *Id.* at 393. "A district court should not make a *Daubert* ruling prematurely, but should only do so when the record is complete enough to measure the proffered testimony against the proper standards of liability and relevance." *Id.*

As pointed out in *Jahn,* "[t]he district court is not obligated to hold a *Daubert* hearing," *id.* (quoting *Clay v. Ford Motor Co.,* 215 F.3d 663, 667 (6th Cir.2000)), when the record is "adequate to the task."[5] *Id.* The *Jahn* opinion does not specifically address the question of what must be in the record for the record to be adequate; however, the expert reports, pathologist reports, and depositions of most of those involved, including the expert's depositions, were deemed insufficient in that case. *Id.* at 393. Usually, the record upon which the trial court will make an admissibility decision without a hearing will consist of the expert reports, affidavits, depositions, briefs of the parties, and the like.

***3** Plaintiffs argue that as of August 4, 2010, the date of the Court's order on the motion for summary judgment, "[t]his case was in about exactly the same procedural posture as *Jahn."* They claim that the issue related to Professor Froeb's methodology was raised for the first time in a supplemental pleading filed by defendants and that their ability to respond was limited. They specifically argue that the Court based its opinion "on an incomplete reading of Professor Froeb's deposition testimony, which retailer plaintiffs were able to complete by filing a supplemental declaration by Professor Froeb (as well as by explaining precisely how Professor Froeb had conducted his analysis)." Plaintiffs cite several other materials, now in the complete *Daubert* record, which were not in the original record prior to August 4, 2010, [*see* Doc. 1206, pp. 14–15].

Defendants, on the other hand, assert that "the only difference between the record [prior to August 4, 2010] and now" is Professor Froeb's "eleventh-hour declaration" which they characterize as Professor Froeb's attempt to say "what he really meant" by his deposition responses. They argue, with relation to this declaration, that "Professor Froeb's say-so that he applied the [horizontal merger] guidelines does not make it so." As an exhibit to their opposition to plaintiffs' objection to the magistrate judge's order, defendants have prepared a "pertinent procedural time line" to illustrate their argument, [see Doc. 1229, Ex. D].

Although the Court will consider defendants' *Daubert* motion anew (see discussion below), it does so only out of an abundance of caution in light of plaintiffs' claims that the Court "jumped the gun" and decided the issue related to Professor Froeb prematurely, and, the Court does so alternatively. On the first issue raised by plaintiffs, the only one which goes to the merits of their objection to the Magistrate Judge's order, however, the Court largely agrees with the defendants. As to the issues related to Professor Froeb's opinions decided by the Court in its summary judgment order, the record was complete and the items referred to by plaintiffs add little or nothing to the Court's analysis, except for the supplemental declaration of Professor Froeb himself. With respect to the procedural objections made by plaintiffs that they informed the Court that the matters were not ripe for resolution and that their response was somehow limited (presumably by the Court), that is simply not the case.

During a hearing on July 1, 2009, the Court specifically inquired of plaintiffs' counsel whether plaintiffs could respond to an anticipated motion for summary judgment. Counsel responded that he thought they could. Then, on November 5, 2009, plaintiffs "advised the Court that they did not believe that the record was complete and that they needed Professor Froeb's report to oppose defendants' motion for summary judgment."[6] Thereafter, the Court did not immediately rule on the motion for summary judgment but withheld ruling until August, 2010, nine months later, and then only after allowing the plaintiffs oral argument on the motion for summary judgment, permitting the filing of numerous replies and supplemental briefs and holding the matter in abeyance until after the close of all discovery of fact witnesses, the filing of expert reports, expert depositions and supplementation of the record with Professor Froeb's full report. In this Court's view, any suggestion by plaintiffs that the Court ruled on an incomplete record or denied them adequate time to fully respond is disingenuous and self-serving. Likewise, their claim that the Court limited them to a five-page brief is also disingenuous. Plaintiffs never, at any time prior to the instant objection, asked the Court to permit further briefing or to extend the number of pages allowed.

*4 Finally, plaintiffs' suggestion that the Court based its opinions on "an incomplete reading of Professor Froeb's deposition testimony," which they were able to cure through the filing of his supplemental declaration, is also somewhat hypocritical. First, they do not even suggest that Professor Froeb's declaration was unavailable prior to its filing on November 15, 2010, or that it could not have been filed when defendants first raised the issue of the methodology used by Professor Froeb, citing his deposition testimony and before the Court's ruling on the summary judgment motion on August 4, 2010.

Plaintiffs could have easily have filed the affidavit of Professor Froeb long before the Court's August 4, 2010 decision on the motion for summary judgment. Professor Froeb was deposed on April 26, 2010, and plaintiffs served defendants with Professor Froeb's errata sheet on June 7, 2010.[7] And, had plaintiffs done so, the Court could have considered it in connection with its consideration of the motion, despite defendants' suggestion that the supplemental motion is simply an effort by Professor Froeb and plaintiffs to "get a mulligan."

Although "a party cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity," *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806, 119 S.Ct. 1597, 143 L.Ed.2d 966 (1999), that rule does not extend to a non-party witness. *See Hanson v. City of Fairview Park*, 349 Fed. App'x 70, 2009 WL 3351751 (C.A.6 (Ohio)). Even if the rule applied, Professor Froeb's supplemental declaration does not flatly contradict his earlier deposition testimony but merely attempts to clarify or explain it.[8]

**II. The *Daubert* Motion**

Professor Froeb was retained by plaintiffs for the purpose of rendering an expert opinion on the relevant product and geographic markets for purposes of this litigation. His opinion as to the relevant product market is not at issue; the motion challenges his opinions as to the definition of the relevant geographic market. For purposes of plaintiffs' conspiracy claim, Professor Froeb defines the relevant geographic market as Federal Milk Market Orders 5 and 7. Federal Order 5 includes North Carolina, South Carolina and parts of Georgia, Indiana, Kentucky, Tennessee, Virginia and West Virginia. Federal Order 7 includes Alabama, Arkansas, Louisiana, Mississippi, the rest of Georgia and Tennessee, and parts of Florida, Kentucky and Missouri. For purposes of plaintiffs' monopolization claims, Professor Froeb defines the relevant geographic market as North Carolina, South Carolina, Virginia, Georgia and Eastern Tennessee.

In general, defendants argue that Professor Froeb's market opinions are based on the use of a theoretical model inconsistent with the applicable legal standards and based on assumptions, not real world facts. More specifically, defendants claim that Professor Froeb's opinions are based on a theoretical model constructed for the purpose of his analysis in this case, a model he characterizes as an application of the "hypothetical monopolist" or "SNNIP" test utilized by the DOJ/FTC as set forth in their Horizontal Merger Guidelines.

*5 Plaintiffs respond that Professor Froeb applied the SNNIP test, a valid and accepted methodology, and that the test, "by its very definition," complies with Supreme Court dictates on definition of the relevant market, as well as relevant Sixth Circuit analysis. They further argue that Professor Froeb captured "appropriate 'market realities,' " such as transportation costs, locations of milk plants within Orders 5 and 7 and actual consumer locations. Plaintiffs

accuse defendants of a "purposeful misconstruction" of Professor Froeb's deposition testimony on these subjects.

**1. The *Daubert* Standard**

The starting point for determining the admissibility of expert testimony in federal courts is Federal Rule of Evidence 702. Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Fed.R.Evid. 702

This Rule reflects the standards enunciated in the Supreme Court's decisions in *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). Fed.R.Evid. 702 advisory cmte. notes, 2000 Amend. ("In *Daubert* the court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testing based in science."). Under the Rule, a proposed expert's opinion is admissible, at the discretion of the trial court, if the opinion satisfies three requirements. First, the witness must be qualified by "knowledge, skill, experience, training, or education." Second, the testimony must be relevant and "assist the trier of fact to understand the evidence or to determine a fact in issue." Third, the testimony must be reliable. Fed.R.Evid. 702.

Rule 702 requires an expert witness to base his opinions upon "sufficient facts and data," rely on "reliable principles and methods," and apply "the principles and methods reliably to the facts of the case." *Id.;* see also Fed.R.Evid. 702 advisory cmte. notes, 2000 Amend. ("[A]ny step that renders the analysis unreliable ... renders the expert's testimony inadmissible.") (internal quotation marks omitted). But, "rejection of expert testimony is the exception, rather than the rule." *Id.*

Generally, if an expert's opinion amounts to "mere guess or speculation," it should be excluded. *United States v. L.E. Cooke Co.*, 991 F.2d 336, 342 (6th Cir.1993). Even though "shaky," however, opinions based on facts in the record are admissible and challenges merely go to the accuracy of the conclusions rather than the reliability of the testimony. *Jahn*, 233 F.3d at 390–93. "An expert's opinion, where based on assumed facts, must find some support for those assumptions in the record. However, mere 'weaknesses in the factual basis of an expert witness' opinion ... bear on the weight of the evidence rather than on its admissibility.' " *McLean v. 988011 Ontario, Ltd.*, 224 F.3d 797, 801 (6th Cir.2000) (quoting *Cooke*, 991 F.2d 342) (internal citations omitted).

***6** The gatekeeper inquiry under Rule 702 and *Daubert* is a flexible determination, allowing the district court to exercise discretion. *Kumho Tire*, 526 U.S. at 157–58. *Daubert* provides a nonexclusive checklist for trial courts in evaluating the reliability of expert testimony that must be tailored to the facts of a particular case. *Id.* at 150 (citing *Daubert*, 309 U.S. at 593). Those factors include: testing, peer review, publication, error rates, the existence and maintenance of standards controlling the technique's operation, and general acceptance in the relevant scientific community. *Daubert*, 509 U.S. 593–94. The *Daubert* factors "are not dispositive in every case" and should be applied only "where they are reasonable measures of the reliability of expert testimony." *Gross v. Comm'r.*, 272 F.3d 333, 339 (6th Cir.2001).

**2. Analysis and Discussion**

The relevant antitrust geographic market has been defined by the United States Supreme Court as "the region in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961). The relevant geographic market must both "correspond to the commercial realities of the industry and be economically significant." *Brown Shoe Co. v. United States*, 370 U.S. 294, 336–37, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); *Tampa Elec.*, 365 U.S. at 327.

To facilitate the analysis in the context of horizontal acquisitions and mergers, the Department of Justice and Federal Trade Commission established the Horizontal Merger Guidelines ("Merger Guidelines") which describe

the "analytical framework and specific standards normally used" by them in analyzing mergers. Merger Guidelines, § 0. The Merger Guidelines define the geographic market as "a region such that a hypothetical monopolist that was the only present or future producer of the relevant product at locations in that region would profitably impose at least a 'small but significant and non-transitory' ["SNNIP"] increase in price, holding constant the terms of sale for all products produced elsewhere." Merger Guidelines, § 1.21. If buyers would respond to the SNNIP by shifting to products produced outside the proposed geographic market, and this shift were sufficient to render the SNNIP unprofitable, then the proposed geographic market would be too narrow. *Id.*

The Sixth Circuit has acknowledged that the use of the SNNIP test "has been recognized in antitrust case law." *Kentucky Speedway, LLC v. NASCAR, Inc.*, 588 F.3d 908 (6th Cir.2009) (citing *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1038 (D.C.Cir.2008) (recognizing the SNNIP test as a ***valid diagnostic tool*** ) (emphasis added)). So far as this Court can tell, however, neither the United States Supreme Court nor the Sixth Circuit have specifically equated the SNIPP test, or any variation of it, with the standard enunciated in *Tampa Electric*. More specifically, the Sixth Circuit has not, as claimed by plaintiffs, held that "[t]he SNIPP test applied by Professor Froeb is the law of this circuit." [Doc. 1159 at 2]. The parties in this case do, however, acknowledge that the SNIPP test is an accepted method of analyzing the geographic market in this antitrust case. The real question for the Court then is whether the methodology employed by Professor Froeb, by whatever name it is labeled, complies with the standard enunciated by the Supreme Court.[9]

***7** Perhaps the best indication of the methodology used by Professor Froeb in formulating his opinions as to the relevant geographic market is his own description of the methodology. He has provided four declarations in the case and has been deposed extensively. His declarations are dated November 5, 2009 (offered in support of plaintiffs' response to defendants' motion for summary judgment), March 5, 2010 (his expert report), June 28, 2010 (his rebuttal report) and November 14, 2010 (clarifying his deposition testimony). Professor Froeb was deposed on April 26, 2010.

In the first declaration, Professor Froeb declares that he has "begun the process of constructing an economic model of competition among bottling plants and the effects of that competition on processed milk customers." [¶ 4]. He quotes the definition of an antitrust market from the Merger Guidelines and opines that the "hypothetical monopolist test is an appropriate paradigm to delineate a relevant market." [¶ 8]. Professor Froeb claims that defendants' "use of shipment data to critique Plaintiffs' proposed market is a well known fallacy for market delineation." [¶ 10]. He further opines that "[m]arket delineation is a fact intensive inquiry." [¶ 14].

In the second declaration, Professor Froeb sets out his conclusions as to the relevant markets and states that he "appl[ies] the methodology of the U.S. Department of Justice and Federal Trade Commission Horizontal Merger Guidelines to identify a group of products, and the area in which they are produced or consumed, over which market power could be exercised." [¶ 8]; *see* also ¶ 30 ( ... "I use the hypothetical monopolist paradigm to delineate a relevant market."). He states his opinions and conclusions about the relevant product market and the relevant geographic markets for the conspiracy and monopolization claims and Dean's market power as follows:

> 10. My conclusions regarding market definition are the following: First, I conclude that fresh white fluid milk is a relevant product market. I base this conclusion on the unique properties of milk and the inelastic demand for the product. Inelastic demand means that following a price increase, few consumers would substitute to other products outside the product market. The less elastic is demand, the more a hypothetical monopolist, who eliminates competition among the products in the relevant market, would increase price.
>
> 11. Second, following the principle that market delineation should inform the theory of the case, I conclude that there are two relevant geographic markets related to two of Plaintiffs' claims. For the claim that defendant Dean Food Company ("Dean") monopolized the market for fresh fluid white milk, I conclude that the relevant geographic market consists of North Carolina, South Carolina, Virginia, Georgia, and the eastern part of Tennessee. For the claim that all defendants conspired to raise price to retail customers, I conclude that the combined region of Federal Orders Nos. 5 and 7 is a relevant geographic market.
>
> ***8** 12. I conclude that the scope of the relevant geographic market differs for each of the two claims because the goal of market definition is to inform the theory of the case. A claim of monopolization should consider the region where milk is sold by the Defendants and bought by the Plaintiffs. The region should be large enough to allow a hypothetical monopolist over all plants in the region

profitably to increase price by a significant amount. Based on my analysis, I conclude that a hypothetical monopolist over all the plants in North Carolina, South Carolina, Virginia, Georgia, and the eastern part of Tennessee would find it profitable to raise price by about 10 percent relative to an industry of independently owned plants. A claim of coordinated action, on the other hand, should begin with a candidate market that includes representative plants owned by the firms in question. Based on my analysis, I conclude that a hypothetical monopolist controlling all the plants in Orders 5 and 7 would find it profitable to raise price by about 15 percent relative to an industry of independently owned plants. This implies that the milk processing plants in Orders 5 and 7 constitute a relevant geographic market for the purposes of evaluating a conspiracy claim.

13. 10. For the monopolization claim, I also asked whether 14 Dean has the ability to exercise market power over the consumers in the relevant market. I conclude that Dean's control over a significant number of plants would allow it to raise price by about nine percent in North Carolina, South Carolina, Virginia, Georgia and the eastern part of Tennessee. Therefore, Dean has the ability to monopolize the relevant market.

[March 5, 2010 Declaration, ¶¶¶¶ 10, 11, 12, 13]. He further states that his conclusions "are based on an economic model that relies on estimates of the demand elasticity for milk and the economic cost of transporting milk from producers to consumers." These estimates are a range which, according to Professor Froeb, "reflects a reasonable range of assumptions regarding how customers respond to price changes and a reasonable range of measures of the cost of transporting bottled milk." [¶ 15].

Professor Froeb further states that he constructed an economic model of competition between milk producers and "ask[s] whether a hypothetical monopolist of the plants in a candidate market would find it profitable to raise price by a small but significant amount (e.g. five percent). If not, then the geographic area is not a relevant antitrust market, and must be increased by adding the next-closest plants and then re-tested." [¶ 33]. Professor Froeb's report gives considerable detail about the methods by which he reached his conclusions and describes how he performed his hypothetical monopolist test. "To perform the hypothetical monopolist test, it is first necessary to characterize competition among milk processors in this industry, and then to determine how a hypothetical monopolist would eliminate competition among commonly-owned milk processors." [¶ 52]. Professor Froeb developed an economic model which he used "to predict how much a hypothetical monopolist would raise price." [¶ 63]. Professor Froeb's conclusions are all couched in terms of the hypothetical monopolist. He "conclude[s] that a hypothetical monopolist of all milk-bottling plants in Federal Orders Nos. 5 and 7 would find it profitable to impose a price increase of at least five percent." [¶ 78]. As a result, he concludes that Orders 5 and 7 "is an area over which market power could be exercised" for the purpose of Plaintiffs' concerted action claim. [¶ 85].

*9 With respect to plaintiffs' monopolization claim, Professor Froeb states that he follows the "methodology of the *Horizontal Merger Guidelines,"* begins with a relatively small geographic candidate market, and concludes that a hypothetical monopolist over the entire state of Georgia, or North Carolina or Virginia "controls too small an area to render a significant price increase profitable." [¶ 86]. Based on an analysis "motivated by including regions where Dean and Food Lion engage in the sale and purchase of milk," Professor Froeb concludes "a relevant antitrust market consists of North Carolina, South Carolina, Virginia, Georgia and the eastern part of Tennessee." [¶¶ 87, 88]. He further concludes "that a hypothetical monopolist over the relevant market could profitably raise price approximately 10 percent." [¶ 89].

So far, so good for plaintiffs at least as to how Professor Froeb characterizes his own work in the declarations. That, however, is where the puzzle becomes more challenging. Defendants deposed Professor Froeb on April 26, 2010. His deposition testimony is problematic. Professor Froeb was asked twice during the deposition whether his market analysis considered "the area in which the seller operates and to which the purchaser can practicably turn for supplies," *i.e.* the *Tampa Electric* standard. The relevant testimony is as follows:

Q. Would you agree that a relevant geographic market is the area in which the seller operates and to which the purchaser can practically turn for supplies?

MR. STENERSON: Object to the form.

THE WITNESS: That's a different—that's not how I would put it. I clearly lay out the principles of market delineation in my—in my report. And based on those principles, that led me to the relevant geographic market that—and that I'm looking at. I'm looking at an area over which a hypothetical monopolist has the potential

to eliminate competition and to raise price. That's how I delineated the relevant market.

MS. FEENEY:

Q. Do you disagree with that statement I just made, that a relevant geographic market is the area in which the seller operates and to which the purchaser can practically turn for supplies?

MR. STENERSON: Object to the form.

THE WITNESS: For the purposes of informing the theory of the case, I don't think that characterizes well what I've done here, or my conclusions here. And I've taken a different approach.

[Doc. ___, Ex. 2, p. 48 ll. 16–24–p. 49, ll 1–16].

Plaintiffs and defendants offer widely different interpretations of this testimony. One thing is clear, however; it is the *Tampa Electric* standard enunciated by the Supreme Court which controls this Court's evaluation of the admissibility of Professor Froeb's testimony. Unless and until the *Tampa Electric* standard is repudiated or modified by the Supreme Court, this Court is bound to apply it, and, although the parties agree that the SNNIP test mirrors the *Tampa Electric* standard, [10] neither the Supreme Court nor the Sixth Circuit has explicitly said so, [11] plaintiffs' reading of the *Kentucky Speedway* opinion notwithstanding. The Court accepts, however, for the purposes of deciding this *Daubert* motion, that proper application of the SSNIP test meets the necessary standard.

***10** The relevant question, therefore, is whether Professor Froeb defines the relevant geographic market as "the area in which the seller operates, and to which the purchaser can practicably turn for supplies." [12] If the analysis done by Professor Froeb applies that standard, whether referred to as "SNIPP," "hypothetical monopolist," or some variation of that, then it is admissible. Otherwise, it is not. Defendants accuse Professor Froeb of giving lip-service to the Merger Guidelines, which, according to plaintiffs, are synonymous with the Supreme Court standard, but in reality using a theoretical model (*i.e.* his own version of the SNIPP test) constructed solely for the purpose of this litigation.

On the basis of Professor Froeb's sworn deposition testimony, this Court has to agree with defendants. When asked if he applied the appropriate standard his answer was quite clear. Asked about whether he delineated the relevant geographic market using the standard enunciated by the Supreme Court, using language which tracks the Court's language precisely, Professor Froeb responded that that description was "not how [he] would put it" but rather that he considered the "area over which a hypothetical monopolist has the potential to eliminate competition and to raise prices." When asked the second time, he was even clearer. "I don't think [the *Tampa Electric* standard] ... characterizes well what I've done here, or my conclusions here .... I've taken a different approach." Taking his words at face value then, Professor Froeb took a "different approach" to market definition than the one dictated by the Supreme Court. That "different approach" renders his methodology—his theoretical model—inadmissible.

Plaintiffs make several arguments in an effort to salvage Professor Froeb's testimony. First, they point to Professor Froeb's deposition testimony that he would have instructed his employees at DOJ/FTC to apply the same methodology he applied as establishing that he in fact applied the Merger Guidelines. This Court previously rejected that testimony as establishing that he did so, a position the Court does not retreat from. Proof that Professor Froeb would have instructed his employees to use the same methodology he has now used proves only that, not that the methodology complies with binding Supreme Court precedent.

Secondly, plaintiffs seem to suggest that Professor Froeb was somehow tricked by defendants' counsel at the deposition because the premise of counsel's questions to Professor Froeb was not identified as having come from the *Tampa Electric* case, pointing out that he is not a lawyer. The Court also rejects this argument. It is ludicrous for plaintiffs to suggest that an expert witness on the relevant antitrust market would not be familiar with Supreme Court pronouncements on the subject, especially given his background at DOJ/FTC. The assertions especially lack credibility when one looks at the reports of Professor Froeb, throughout which he cites or relies upon applicable legal principles in the antitrust field. For instance, in footnote 3 of Professor Froeb's report, he parrots plaintiffs' argument that they need not prove a relevant geographic market for their conspiracy claim because "to the extent Plaintiffs claim that Defendants' conduct was illegal *per se*, no market definition is necessary." He also cites the *"Cellophane* fallacy," citing *United States v. E.I. DuPont deNemours & Co.*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956), affirming 118 F.Supp. 41 (D.Del.1953).

***11** Most significantly, however, plaintiffs rely in large part on Professor Froeb's November 14, 2010 declaration which purports to "clarify" his deposition testimony which he claims defendants have "misconstrued."[13] He declares that the "different approach" he referred to "was precisely the hypothetical monopolist test," and points out that he notes in his report that he "consider[ed] the region where milk is sold by the defendants and bought by the plaintiffs."[14] Even if the filing of the clarifying declaration is appropriate, plaintiffs cannot create an issue where none otherwise existed by providing a witness's "clarifying," after the fact statements. As noted above, the clarifying declaration sheds little light on Professor Froeb's testimony that he used a "different approach" than the one required by *Tampa Electric.*

To paraphrase Professor Froeb's deposition testimony, clarified by his declaration: "I would not say that a relevant geographic market is the area in which the seller operates and to which the purchaser can practically turn for supplies. That's not how I would put it. I don't think the *Tampa Electric* standard characterizes well what I've done here, or my conclusions here. I've taken a different approach. The different approach I have taken is that I implement the Supreme Court's guidance through the use of the hypothetical monopolist test". Professor Froeb never explained how the "same approach" can be a "different approach." The Court will not speculate about the methodology used by Professor Froeb nor will it attempt to ferret out what he really did (i.e. the methodology used) without reference to what he said he did. The plaintiffs, as the parties seeking to have Professor Froeb's testimony admitted, bear the burden of showing "that the expert's findings are based on sound science" and this requires an "objective independent validation of the expert's methodology." *Daubert v. Merrill Dow Pharmaceuticals, Inc.* (on remand), 43 F.3d 1311, 1316 (9th Cir.), *cert. denied,* 516 U.S. 869, 116 S.Ct. 189, 133 L.Ed.2d 126 (1995) (quoted by *Smelcer v. Norfolk Southern Ry. Co.,* 105 F.3d 299, 303 (6th Cir.1997) *abrogated on other grounds* by *General Elec. Co. v. Joiner,* 522 U.S. 136, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).["T]he expert's bold assurance of validity is not enough." *Id.* Furthermore, the court's focus is on the expert's methodology, not the correctness of his conclusions. *Id.* at 1318 (cited by *Smelcer,* 185 F.3d at 303). Plaintiffs have not validated Professor Froeb's methodology and his opinions are inadmissible for that reason alone.

Plaintiffs also take issue with the Court's statements in its August 4, 2010 opinion related to the requirement, set forth in *Tampa Electric,* that determination of the relevant antitrust geographic market requires an assessment of the "commercial realities" facing buyers and sellers in the market place, *Tampa Electric,* 365 U.S. at 327, a concept explicitly recognized by the Merger Guidelines. *See* Merger Guidelines §§ 1.0, 1.2. While plaintiffs do not contest the Court's statement of the applicable standard, they do argue that the following finding was clear error:

> ***12** Professor Froeb admits that he did not assess the 'commercial realities,' *Id.,* but rather relied solely on his theoretical model. Such an approach may be academically acceptable; it does not, however, comply with the Supreme Court's dictates with respect to construction of the relevant geographic market.

[Doc. 863 at 29].

Plaintiffs are puzzled by the Court's use of "Id." in the first sentence quoted above and suggest that the defendants "[b]y putting 'commercial realities' in quotes [in their supplemental reply] may have misled the Court into believing that the words were spoken by Professor Froeb." [Doc. 1206 at 20]. While the "*Id.*" reference does appear to have been misplaced, the Court was not misled by defendants' conduct or by any "false representation" by defendants that the commercial reality not considered by Professor Froeb had to do with milk supply movement from outside the candidate market. In support of their position, plaintiffs point to Professor Froeb's report which states that Professor Froeb "employ[s] the Cournot model of competition" and "takes into account the geographic location of existing milk bottling plants in Federal Order No. 5 of milk bottling plants that compete for customers in Federal Orders Nos. 5 and 7." [Froeb declaration, March 5, 2010, ¶ 64]. He further states that his analytical model takes as input "[e]very non-captive plant in Orders 5 and 7 operating in December, 2008" and "every regulated, non-captive plant within 300 miles of Orders 5 and 7."[15] [*Id.* at ¶ 75]. In short, plaintiffs argue that "Professor Froeb did not ignore 'commercial realities,' much less admit to doing so, and the Court's finding on this point is in error." [Doc. 1206 at 21].

Whether the phrasing of the Court's statement was technically accurate or not, the fact remains that Professor Froeb does acknowledge that he did not generally consider certain facts relating to actual behavior within the market, what the Court would characterize as "commercial realities." He did not consider or find relevant, for instance, data or

materials concerning Food Lion, Fidel Breto, or any other retailer's purchasing behavior or the sales or pricing data of Dean or other milk processors; he did not consider relevant information about where retailers *actually* turn for supplies currently; nor did he consider relevant information about how purchasers have *actually* reacted to actual price increases. Although Professor Froeb states in his declaration, generically speaking, that he reviewed "documents produced by the parties in discovery," there is a paucity of support in this record for a conclusion that he based his opinions in the case on the evidence in the record but rather that he constructed a theoretical economic model which relied on "estimates" and "assumptions." [Froeb declaration, March 5, 2010, ¶ 15].

Two other things illustrate that Professor Froeb largely ignored the commercial realities. First, plaintiffs identify in their objection two pieces of economic literature which they claim were necessary for the Court to have a complete *Daubert* record. Both illustrate how Professor Froeb's approach is divorced from actual economic realities. The first is an article written by Gregory J. Werden, an economist in the Antitrust Division of the Department of Justice.[16] [Doc. 1159, Ex. 4]. Plaintiffs characterize the import of the article thusly: "The test must use as 'inputs' facts that would exist in this *hypothetical* world which are not necessarily observable in the real world." [*Id.* at 6]. While acknowledging that the law requires that these fact inputs take into account commercial realities, plaintiffs claim that "the economist's job is to figure out how to appropriately take the necessary realities into account in an exercise that is, by definition, hypothetical." [*Id.* at 7]. The second article, not directly related to the antitrust issues in this case, [Doc. 1159, Ex. 7], notes the "widely used *Cournot* model of oligopoly," a model used by Professor Froeb and one used by the Federal Energy Regulatory Commission "as a screening device for evaluating a pipeline's market power." Interestingly, the article deals with the "assumptions underlying the *Cournot* model" and "standard assumptions used in textbook exposition of the *Cournot* game."

***13** Secondly, however, is the testimony of Professor Froeb himself. When questioned about his model, Professor Froeb gave the following testimony:

BY MS. FEENEY:

Q. The hypothetical monopolist is a construct used for purposes of this hypothetical experiment, correct?

A. It's an analytical tool used by economists to determine whether or not there is the potential for the exercise of market power in the relevant market.

Q. And it's generally counterfactual, right,

A. Counterfactual, you mean by—what do you mean by counterfactual?

Q. It's a hypothetical. It's not based on real world facts?

MR. STENERSON:

Object to the form. Mischaracterizes his model in his report and his testimony.

THE WITNESS: Yeah. So I'm not trying to say anything about how are people currently behaving in the market. I'm trying to say: I'm just trying to identify an area in which there is potential for the exercise of market power.

....

MS. FEENEY:

Q. Would you agree that if a model doesn't fit the significant facts, it can result in misleading predictions?

MR. STENERSON: Object to the form.

THE WITNESS: So models are tools. They are designed to capture the significant features of competition and predict how certain actions change that competition. They can-they can give misleading answers, yes.

BY MS. FEENEY:

Q. Would you agree that assumptions or predictions used in a model can be refuted by evidence?

MR. STENERSON: Object to the form.

THE WITNESS: If a model doesn't capture the significant features of competition, then its predictions may be misleading.

BY MS. FEENEY:

Q. So the answer to my question is, yes, you would agree that assumptions or predictions of a model can be refuted by evidence?

MR. STENERSON: Object to the form.

> THE WITNESS: That's not what I said. I said, look, a model is a tool, and it's appropriate for some uses, and inappropriate for others. And what I would—what I would say is that if a model can capture the significant features of competition in an industry, then it can be used —or if a model misses significant features of an industry, and significant features of competition, then it may give misleading predictions.

[Froeb deposition, April 26, 2010, p. 80, l. 5–81, 1. 1; p. 84, l. 20–86, l. 2]. So, whether you characterize Professor Froeb's statements as an "admission" that he did not consider actual commercial realities or not, Professor Froeb did clearly say he was not "say[ing] anything about how are people currently behaving in the market."

Next, plaintiffs take issue with the Court's finding that Professor Froeb had constructed his model with reference to a single customer, Food Lion, in violation of applicable legal requirements. [Doc. 863 at 29]. Plaintiffs incorrectly identify the origin of that conclusion as defendants' supplemental reply. Rather, the conclusion comes directly from Professor Froeb's declaration, where he states: "My analysis is motivated by including regions where Dean [sells] and Food Lion [purchases] milk." [Froeb declaration, March 5, 2010, ¶ 87]. Plaintiffs accuse the Court of misconstruing the language in Professor Froeb's declaration, but they do not quarrel with the legal principle underlying the Court's finding. As the Court stated in its prior memorandum, "A geographic market cannot ordinarily be defined by reference to a single customer." [Doc. 863 at 29] (citing *Apani Southwest Inc. v. Coca–Cola Enterprises, Inc.*, 300 F.3d 620, 632–33 (5th Cir.2002)). *See also Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1249 (11th Cir.2002) ("the law is clear, however, that a geographic market cannot be drawn simply to coincide with the market area of a specific company").

***14** Likewise, plaintiffs don't really dispute that Professor Froeb did not consider the location of any other retailers, including the other named plaintiff, Fidel Breto. What they do argue is that Professor Froeb analyzed all purchasers of milk in the market, i.e., people who buy milk, by considering "population census data to determine where people live as a proxy for demand for milk" and "assum[ing] that population density would mimic demand for milk, and that Food Lion and other retailers will be set up to efficiently serve the milk drinking population." While the argument has some logical appeal on the surface, it confuses the retail purchasers of milk with the retailers who purchase milk from processors. It is Food Lion's purchase of milk from processors which is relevant and where it purchases milk may be completely unrelated to population census data. That is further support for defendants' argument that Professor Froeb's model is disassociated from the commercial realities, as defendant suggest.

Finally, plaintiffs argue with that the Court's previous finding that Professor Froeb's assertion that he would have instructed staff at the Department of Justice and Federal Trade Commission to employ the same methodology he has employed in this case established "only that," i.e. that he would have instructed his staff to do so, and does not establish that the methodology complied with Supreme Court dictates. Plaintiffs claim that Professor Froeb's assertion, indeed, does prove "that he applied the standard mandated by the Sixth Circuit" rather than a special test employed for this litigation. The Court continues to disagree, largely for the reasons discussed above. Accepting that the standards of *Tampa Electric* and the Merger Guidelines are equivalent, Professor Froeb must still properly apply the Merger Guidelines and the fact that he might have instructed staff hundreds of times to apply the methodology he applied in this case simply does not prove the proposition plaintiffs suggest. In fact, Professor Froeb's own testimony suggests that he did not apply the Merger Guidelines, in total, to his work in this case. He testified:

> THE WITNESS: ... I've done this for hundreds of industries and hundreds of merger cases at the FTC and DOJ.
>
> And that the-the basic methodology that I'm using here, ***except*** I'm applying it to industry of independently owned firms relative to a hypothetical monopolist.

[Froeb deposition, April 26, 2010, p. 77, ll. 18–24] (emphasis added). In other words, it appears that Professor Froeb, by his own admission, modified what he had done "for hundreds of industries and hundreds of merger cases" in applying his model in this case.

As the above illustrates, even if the Court were to grant plaintiffs a full *Daubert* hearing and oral argument in the case, there are fundamental reasons why Professor Froeb's testimony does not meet the applicable standards and would be inadmissible. Thus, the Magistrate Judge's order would be subject to being adopted and approved on that ground as well.

***15** For the reasons set forth herein, plaintiffs' objection, [Doc. 1206], is OVERRULED and the Magistrate Judge's order, [Doc. 1191], is AFFIRMED AND ADPOTED by the Court and made the ORDER of the Court.

So ordered.

**Parallel Citations**

2012-1 Trade Cases P 77,948

Footnotes

1 Defendants' underlying *Daubert* motion to exclude the testimony of Professor Froeb and the supporting memorandum are Docs. 1088 and 1089; plaintiffs' response is Doc. 1159; and defendants' reply is Doc. 1172.

2 This case is no longer assigned to a Magistrate Judge.

3 In fact, plaintiffs have advised the Court that they do not intend to seek such reconsideration.

4 The Magistrate Judge's order, in sum, merely held that this Court's prior ruling in connection with defendants' motion for summary judgment that Professor Froeb's methodology did not comply with applicable Supreme Court standards and was thus inadmissible was the law of the case. In that, the Magistrate Judge was correct and plaintiffs do not explicitly challenge that holding. They merely argue that the Magistrate Judge's conclusion was procedurally flawed because the Court did not rule "on whether Professor Froeb's proposed testimony on geographic market complies with the applicable *Daubert* standard, with the benefit of full briefing on a complete record." It is not clear that plaintiffs can properly challenge the undersigned district judge's ruling through the mechanism of an objection to the order of the Magistrate Judge. In essence, plaintiffs complain that the Magistrate Judge did not make independent findings regarding the merits of this Court's prior opinions, which they now assert were based on findings that were clearly erroneous. That is confirmed by plaintiffs' argument that the Magistrate Judge's order "was contrary to law because it accepted as the 'law of the case' an opinion that was not based on a complete record and was issued after the Court rejected retailer plaintiffs' request to await full *Daubert* proceedings. [Doc. 1206 at 13]. Nevertheless, retailer plaintiffs "advise the Court that they do not intend to seek reconsideration of the Court's dismissal of Counts II–IV of the complaint."

5 Although plaintiffs now request a hearing, they cannot make any serious argument that the record is not adequate for the Court to now decide admissibility without a hearing, were it to choose to do so.

6 Plaintiffs' response to the motion for summary judgment, [Doc. 538], was filed on November 5, 2009. Attached to the response was the Rule 56(e) affidavit of counsel. Document 538 was subsequently stricken from the record by the Magistrate Judge and refiled as Document 669 on January 22, 2010.

7 It is not suggested by plaintiffs that Professor Froeb noted any of his November 14 "clarifications" on the errata sheet.

8 As noted elsewhere, plaintiffs have not asked the Court to reconsider its prior summary judgment ruling and the dismissal of certain counts of the complaint because of plaintiffs' inability to establish the relevant market. If plaintiffs had asked for reconsideration, the Court would be well justified in refusing to consider Professor Froeb's supplemental declaration. *See Sommer v. Davis,* 317 F.3d 686 (6th Cir.2003) (holding that a district court's refusal to consider evidence produced for the first time on a motion to reconsider will not be reversed absent an abuse of discretion).

Secondly, and more fundamentally, however, plaintiffs attempt to explain Professor Froeb's deposition testimony through a supplemental declaration is misplaced. Professor Froeb's deposition testimony is what it is. While there might arise a situation where it would be necessary and appropriate for a witness to explain or clarify deposition testimony, this is not such a case. This is not a situation where Professor Froeb misspoke or gave an incomplete response. This is a situation where he attempts, through his supplemental declaration, to "clarify," unambiguous testimony about the methodology he used, *e.g.,* an effort to explain "what he really meant" by his answer, as defendants argue. The supplemental declaration adds nothing of substance to the Court's inquiry. Indeed, the practice of allowing witnesses to endlessly explain or clarify their prior testimony, depending on how it was interpreted, would undermine the utility of the summary judgment procedure and needlessly prolong litigation.

As set forth above, the plaintiffs' procedural objection to the Magistrate Judge's order based on *Jahn* is not well taken and thus the Magistrate Judge's holding that the Court's prior ruling with respect to Professor Froeb's opinion is the law of the case must be affirmed. For the reasons already mentioned, and because exclusion of Professor Froeb's opinion may result in a grant of summary judgment on Count V and on plaintiffs' rule of reason claim in Count I, the Court will, alternatively, although it is not necessary to do so, revisit the question of the admissibility of Professor Froeb's testimony.

9 Professor Froeb acknowledged in his deposition that he was "not aware of any specific court decisions" that have allowed the use of the model used by him in this case in a non-merger antitrust case. Likewise, plaintiffs have cited no case where Professor Froeb's theoretical model has been specifically approved for use in determining the relevant market.

10 Plaintiffs refer to the SNNIP test and *Tampa Electric* as "one and the same." Defendants agreed at oral argument on their *Daubert* motion that the SNNIP test is the proper test, but argue that it was not properly applied by Professor Froeb.

11 Some courts have in fact recognized that the Merger Guidelines are not binding on the courts. *See Chicago Bridge & Iron Co. v. F.T.C.*, 534 F.3d 410, 432 F. N11 (2008) ("Merger Guidelines are often used as persuasive authority when deciding if a particular acquisition violates anti-trust laws.") (citing *United States v. Kinder*, 64 F.3d 757, 771 (2d Cir.1995)). *See also Chicago Bridge*, 534 F.3d at 434, FN13 and cases collected therein.

12 Professor Froeb futher muddies the water by his statement in his supplemental declaration that he performed his "economic analysis to address the question of where customers 'can practically' turn for supplies," omitting any mention of the rest of the *Tampa Electric* standard. This further illustrates the fact that clarifying declarations may themselves raise questions which in turn require further clarification.

13 Plaintiffs accuse defendants of attempting to "spin" Professor Froeb's deposition responses and suggest "his answer does not and cannot change what he actually did do." In other words, it appears that plaintiffs invite the Court to ignore what Professor Froeb said he did, and instead find that he used an appropriate method.

14 So far as the Court can determine, this reference, in paragraph 12 of Professor Froeb's report, is the only one that even approximates the standard enunciated in *Tampa Electric*.

15 As discussed below, however, that appears to be contradicted by Professor Froeb's statement that his "analysis [for analyzing the monopolization claim] is motivated by including regions where Dean and Food Lion engage in the sale and purchase of milk." [Froeb declaration, March 5, 2010, ¶ 87].

16 This article expressly disclaims that its views reflect those of the Department of Justice.

End of Document

1991 WL 261831
Only the Westlaw citation is currently available.

CHECK OHIO SUPREME COURT RULES FOR REPORTING OF OPINIONS AND WEIGHT OF LEGAL AUTHORITY.

Court of Appeals of Ohio, Third District, Allen County.

Mac McGUIRE, Appellant-Appellee,
v.
James L. MAYFIELD, Administrator, et al., Appellees-Appellants,
and
Tilton Corporation, Appellee-Appellant.
Mac McGUIRE, Appellant-Appellee,
v.
James L. MAYFIELD, Administrator, et al., Appellees-Appellants,
and
Tilton Corporation, Appellee-Appellee.

Nos. 1-90-83, 1-90-88. | Dec. 9, 1991.

Administrative Appeals from Common Pleas Court.

**Attorneys and Law Firms**

Lee Fisher, Attorney General, Jetta Mencer, Assistant Attorney General, Workers' Compensation Section, Columbus, for appellant Bureau of Workers' Comp.

Tilton Corporation, Lima, appellant.

Mary Bridgett Sweeney, Cleveland, for appellee.

**Opinion**

**OPINION**

THOMAS F. BRYANT, Presiding Judge.

*1 These are appeals from judgments of the Allen County Court of Common Pleas in favor of appellee, Mac McGuire ("McGuire"), and against appellants, the Industrial Commission of Ohio, the Administrator of the Bureau of Workers' Compensation, and Tilton Corporation ("Tilton").

I

McGuire filed a claim with the workers' compensation board seeking to participate in the workers' compensation fund because he is allegedly suffering from asbestosis which he claims to have contracted as a result of his employment. The board denied McGuire's claim and he appealed to the Allen County Court of Common Pleas. Following trial, the jury returned its verdict finding that McGuire was entitled to participate in the fund.

The Industrial Commission and the Administrator of the Bureau of Workers' Compensation appeal that decision asserting ten assignments of error. Tilton filed a separate appeal which raises some of the same assignments of error in essence, as well as additional assignments of error not raised by the other appellants. The cases were consolidated for purposes of briefing and oral argument. We dispose of both appeals in this decision.

McGuire worked intermittently as a sheet metal worker and as an insulator during the years from 1957 to 1987. He was employed by Tilton periodically throughout this thirty year period. He claims to have been exposed to asbestos in the years until approximately 1971 while applying asbestos-containing insulation and from 1972 to 1987 while working around others who were removing asbestos-containing materials from piping as he was applying insulation. McGuire's most recent employment with Tilton was from 1985 to 1987.

After considering evidence in the record and evidence adduced at hearing, the District Hearing Officer for the Bureau of Workers' Compensation concluded that McGuire "did not contract an occupational disease in the coursee [sic] of employment." Upon appeal, the Regional Board of Review affirmed that decision. Upon further appeal, a jury of the Common Pleas Court of Allen County found that McGuire did contract asbestosis in the course of employment and was entitled to participate in the workers' compensation fund.

Combining both appeals filed in this court, appellants assert twenty assignments of error. For the sake of brevity, we will not set those forth verbatim.

II

Appellants, Bureau of Workers' Compensation and Industrial Commission, assert in their Assignment of Error No. I, and appellant Tilton asserts in its Assignments of Error Nos. V and VII that the trial court erred in denying their motions for directed verdict. Appellants argue they were entitled to directed verdicts because McGuire allegedly failed to produce medical evidence sufficient to satisfy the requirements of R.C. 4123.68(AA), which provides in pertinent part:

"(AA) Asbestosis: Asbestosis means a disease caused by inhalation or ingestion of asbestos, demonstrated by x-ray examination, biopsy, autopsy, or other objective medical or clinical tests."

***2** Two physicians testified on behalf of McGuire. Dr. Holladay, a general practitioner, diagnosed bronchitis and pneumonitis. He testified that he was unable to obtain conclusive test results concerning the presence of asbestosis and then referred McGuire to Dr. Hayhurst, a pulmonary specialist. Nevertheless, Dr. Holladay expressed an opinion, apparently based only on a report from Dr. Hayhurst, that McGuire suffers from asbestosis.

Dr. Hayhurst testified that he diagnosed McGuire as having asbestosis and chronic bronchitis. He based the diagnosis of asbestosis on a lung function test and the work history given to him by McGuire. He admitted that he reviewed a chest x-ray of McGuire which did not reveal any signs of asbestosis. He further admitted that the lung function test, which is a breathing test, is affected by patient effort.

Dr. Hayhurst testified that the lung function test administered to McGuire indicated he is suffering from restrictive pulmonary impairment, which is indicative of asbestosis. Upon further inquiry, however, Dr. Hayhurst admitted that restrictive impairment alone does not indicate asbestosis as such impairment can be caused by other diseases.

It is undisputed that asbestosis has not been demonstrated by x-ray examination, biopsy or autopsy. The only issue is whether McGuire presented "other objective medical or clinical tests" of asbestosis. It is our opinion that he has not.

Dr. Hayhurst, McGuire's medical expert, admitted that the pulmonary function test can be affected by patient effort. Dr. Grodner, a pulmonary specialist who examined McGuire at the appellants' request and found no evidence of asbestosis, testified that a pulmonary function test is subjective because it is affected by patient effort.

Since McGuire failed to produce objective medical evidence of asbestosis as required by R.C. 4123.68(AA), we find the Bureau's and the Industrial Commission's Assignment of Error No. I and Tilton's Assignments of Error Nos. V and VII to be well taken.

## III

For their second assignment of error, the Bureau and the Industrial Commission argue that the trial court erred in admitting hypothetical questions posed to Dr. Hayhurst and Dr. Holladay as those questions allegedly assumed facts not in evidence. Tilton asserts the same error as to the hypothetical question posed to Dr. Hayhurst in its Assignment of Error No. III. A review of the record indicates that counsel for McGuire asked both doctors to express an opinion as to McGuire's condition based upon several assumptions stated by counsel. Both doctors then expressed opinions based upon those assumptions.

Evid.R. 703 provides that an expert may base his opinion on facts "perceived by him or admitted in evidence at the hearing." See, also, *State v. Chapin* (1981), 67 Ohio St.2d 437, 442 (citing *Burens v. Indus. Comm.* (1955), 162 Ohio St. 549). An expert must base his opinion upon facts within his own personal knowledge or upon facts shown by other evidence. *Burens,* 162 Ohio St. 549, paragraph one of the syllabus.

***3** We believe that the hypothetical questions posed to Dr. Hayhurst and Dr. Holladay unfairly characterized the evidence and were prejudicial to appellants. Accordingly, we find the Bureau's and the Industrial Commission's second assignment of error and Tilton's third assignment of error to be well taken.

## IV

The Bureau's and the Industrial Commission's Assignments of Error Nos. III and IV assert that the trial court erred in failing to direct a verdict in their favor on the basis that McGuire failed to prove that he was exposed to asbestos and/or contracted asbestosis in the course of his employment. Civ.R. 50(A) provides that a directed verdict shall be granted upon motion properly made if, construing the evidence most strongly in favor of the party opposing the motion, the court

finds that reasonable minds could come to but one conclusion and that conclusion is adverse to such party.

As we held in our discussion of the Bureau's and Industrial Commission's Assignment of Error No. I and Tilton's Assignments of Error Nos. V and VII, McGuire produced no competent objective medical evidence that he is suffering from asbestosis. Accordingly, reasonable minds could come to but one conclusion and that conclusion is adverse to McGuire. The trial court's denial of the Bureau's and the Industrial Commission's motion for directed verdict on these grounds was error.

The Bureau's and the Industrial Commission's Assignments of Error Nos. III and IV are well taken.

V

The Bureau's and the Industrial Commission's Assignment of Error No. V and Tilton's Assignment of Error No. X assert that the trial court's judgment must be vacated as it is against the weight of the evidence. A reviewing court may not reverse a judgment which is supported by some "competent, credible evidence going to all the essential elements of the case". *C.E. Morris Co. v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, 280. As we held in our discussion of the Bureau's and Industrial Commission's Assignment of Error No. I and Tilton's Assignments of Error Nos. V and VII, McGuire produced no competent objective medical evidence, as required by statute, that he is suffering from asbestosis. Thus, the verdict is not supported by the evidence in the record.

Accordingly, the Bureau's and the Industrial Commission's Assignment of Error No. V and Tilton's Assignment of Error No. X are well taken.

VI

In their Assignments of Error Nos. VI, VII, VIII, IX and X, the Bureau and the Industrial Commission assert that the trial court erred in ordering the Industrial Commission to pay various deposition costs and attorney fees incurred by McGuire. Assignment of Error No. VI relates to costs of depositions of two employees of Tilton. We agree with the Bureau and the Industrial Commission that payment for such costs is not authorized by R.C. 4123.519(C), which relates only to depositions of physicians. Therefore, the general rule concerning deposition costs applies. That rule provides that depositions are not taxed as costs if they are not used at trial. *Barrett v. Singer Co.* (1979), 60 Ohio St.2d 7. Since neither of these depositions was used legitimately at trial, they were not properly taxable as costs to the Industrial Commission.

***4** For the reason stated above, the Bureau's and the Industrial Commission's Assignment of Error No. VI is well taken.

VII

Assignment of Error No. VII set forth by the Bureau and the Industrial Commission relates to the trial court's order to the Industrial Commission to pay both the cost of the transcripts and videotaping of the depositions of Dr. Hayhurst and Dr. Holladay. They allege that the Industrial Commission should be charged only with the higher cost, the videotaping, and not both costs.

App.R. 9(A) provides that a videotape recording of proceedings constitutes the transcript of proceedings and there is no requirement that they be transcribed in written form. The trial court has discretion in deciding whether or not to award such expenses as taxable costs. *Glover v. Massey* (Jan. 11, 1990), Cuyahoga App. No. 56351, 56802, unreported. If the trial court found that it was "necessary and vital to the litigation" that written transcripts be provided, then it properly exercised that discretion. *Id.* We find no evidence in the record that the trial court found it necessary to have written transcripts of these depositions; however, we presume the trial court made the finding necessary to support its order. See *State, ex rel. Fulton, v. Halliday* (1944), 142 Ohio St. 548; and, *Rossman v. Conran* (1988), 61 Ohio App.3d 246.

The Bureau's and the Industrial Commission's Assignment of Error No. VII is not well taken.

VIII

The Bureau's and the Industrial Commission's Assignment of Error No. VIII asserts that the trial court erred in ordering the Industrial Commission to pay the cost incurred by McGuire in obtaining a copy of the transcript of his deposition. In opposition to this assignment of error, McGuire asserts that

his "depositional [*sic* ] costs which only includes the price of the copy, should be recoverable since a plaintiff should be afforded the right to obtain a copy of his previous testimony. To preclude recovery of this cost could directly affect the ability of the plaintiff to sustain cross-examination at trial." Counsel for McGuire cites no authority in support of this proposition and we have found none. Without such authority, McGuire's argument is not persuasive.

Accordingly, the Bureau's and the Industrial Commission's Assignment of Error No. VIII is well taken.

IX

The Bureau and the Industrial Commission assert in their Assignment of Error No. IX that the trial court erred in ordering the Industrial Commission to pay the cost of playing the videotaped depositions of Dr. Hayhurst and Dr. Holladay at trial. C.P.Sup.R. 12(D)(1)(c) provides that "[t]he expense of playing the videotape recording at trial shall be borne by the court." See, also, *Glover v. Massey* (Jan. 11, 1990), Cuyahoga App. No. 46351, 56802, unreported.

The trial court's order that the Industrial Commission pay this cost was clearly in error. Therefore, the Bureau's and the Industrial Commission's Assignment of Error No. IX is well taken.

X

*5 The Bureau's and the Industrial Commission's Assignment of Error No. X asserts that the trial court erred in ordering the Industrial Commission to pay to McGuire attorney's fees in the amount of $1,500. They argue that the court is authorized to award attorney's fees in the amount of twenty percent of an award up to $3,000 and ten percent of any amount in excess thereof, not to exceed $1,500. They allege that, since no award has yet been given to McGuire, the award of attorney's fees is in error.

The amendment to R.C. 4123.519(E), effective November 3, 1989, provides that attorney's fees may be awarded based upon the effort expended not to exceed $2,500. Based upon the amendment to this statute, the trial court did not err in awarding an attorney's fee of $1,500, but in view of the disposition of this case on appeal, the matter is now moot.

The Bureau's and the Industrial Commission's Assignment of Error No. X is not well taken.

XI

Tilton's Assignment of Error No. I asserts that the trial court erred in overruling its motion under Rule 19. Tilton argues that McGuire's previous employers should have been joined as necessary parties since McGuire may have been exposed to asbestos while working for those employers. We agree that those employers should have been joined as parties. See *State, ex rel. Burnett, v. Indus. Comm.* (1983), 6 Ohio St.3d 266. Given our disposition of this case under the Bureau's and Industrial Commission's Assignment of Error No. I and Tilton's Assignments of Error Nos. V and VII, however, Tilton has suffered no prejudice from the error.

XII

Tilton's Assignment of Error No. II asserts that the trial court erred in overruling its motion to exclude Dr. Holladay's testimony. Tilton argues that such testimony should have been excluded for any or all of the following reasons: (1) Dr. Holladay is not an expert on asbestosis because he is a general practitioner rather than a pulmonary specialist and, as such, is not competent to express an opinion as to whether McGuire is suffering from asbestosis; (2) Dr. Holladay's testimony does not satisfy the requirements of R.C. 4123.68(AA) because his opinion is not based upon objective medical evidence; and, (3) Dr. Holladay's opinion is inadmissible under Evid.R. 403 because its limited probative value is substantially outweighed by unfair prejudice and/or such testimony is merely cumulative.

The only issue raised by this assignment is whether Dr. Holladay's entire testimony should have been excluded. This testimony was proper since Dr. Holladay was one of McGuire's treating physicians and his testimony laid the groundwork for Dr. Hayhurst's testimony. We are not called upon to decide any other issue with respect to this testimony and we express no opinion on questions not presented.

Tilton's Assignment of Error No. II is not well taken.

XIII

In its fourth assignment of error, Tilton asserts that the trial court erred by admitting lay opinions concerning McGuire's alleged exposure to asbestos. Several individuals who worked with McGuire during 1985 and 1986 testified that he was exposed to asbestos on the job. This testimony appears to be based on the fact that the work area was dusty; however, the witnesses admitted that it is impossible to see asbestos fibers floating in the air.

*6 Evid.R. 701 provides that:

"If the witness is not testifying as an expert, his testimony in the form of opinions or inferences is limited to those opinions or inferences which are (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his testimony or the determination of a fact in issue."

Since these lay witnesses admitted that asbestos fibers cannot be seen floating in the air, their testimony that McGuire was exposed to asbestos on the job is clearly not rationally based on their perceptions. Accordingly, this testimony was improperly admitted.

For the reason stated above, Tilton's Assignment of Error No. IV is well taken.

XIV

In its sixth assignment of error, Tilton asserts that the trial court erred by excluding testimony proffered by it. The plant safety director at the time of McGuire's alleged exposure attempted to testify that the respirators used at the job site were in compliance with Occupational Safety and Health Administration ("OSHA") standards. The basis for this testimony was a letter from OSHA. Tilton argues that this letter demonstrates how the witness obtained personal knowledge of such compliance.

A supervisor attempted to testify as to results of lab tests performed on insulation materials taken from the plant. The basis of this testimony was a lab report. The witness did not perform the tests himself. Tilton again argues that the report demonstrates how the witness obtained personal knowledge of the test results. We disagree.

Tilton clearly attempted to introduce the letter and lab report to prove the truth of the matters asserted therein. Since these documents are hearsay, the trial court's refusal to admit them was not error. See Evid.R. 801(C).

Accordingly, Tilton's Assignment of Error No. VI is not well taken.

XV

In its eighth assignment of error, Tilton asserts that the trial court erred in failing to give three jury instructions it requested. We hold that the first two instructions are a misstatement of law and, therefore, the trial court was correct in refusing to give those instructions. The third requested instruction is not supported by evidence in the record and, as such, the instruction could not properly have been given. *O'Day v. Webb* (1972), 29 Ohio St.2d 215.

For the reasons stated above, Tilton's eighth assignment of error is not well taken.

XVI

Tilton's Assignment of Error No. IX alleges that the trial court erred in overruling its motion for continuance. Prior to trial, counsel for Tilton moved for a continuance because counsel had been contacted by Tilton only seven days prior to the trial date. Counsel argued that he did not have sufficient time to prepare for trial and that a continuance should be granted.

C.P. Sup.R. 7(A) provides:

"The continuance of a scheduled trial or hearing is a matter within the sound discretion of the trial court for good cause shown."

We find no abuse of discretion on the part of the trial court in overruling Tilton's motion for continuance. Tilton was served in this action and has set forth no good cause as to why counsel was not obtained in a timely manner.

*7 Finding no abuse of discretion, we hold that Tilton's Assignment of Error No. IX is not well taken.

XVII

Accordingly, the judgments of the Court of Common Pleas of Allen County are reversed and judgment is hereby entered for appellants, determining that appellee is not entitled to participate in the workers' compensation fund upon the claim presented.

*Judgments reversed.*

HADLEY and SHAW, JJ., concur.

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66 C.J.S. New Trial § 331

Corpus Juris Secundum
Database updated March 2014
New Trial

Francis C. Amendola, J.D., John N. Kennel, J.D., of the staff of the National Legal Research Group, Inc., John Kimpflen, J.D., Robert Koets, J.D., Tom Muskus, J.D.

V. Proceedings at New Trial

Topic Summary References Correlation Table

# § 331. Issues and scope of inquiry

**West's Key Number Digest**

**West's Key Number Digest, New Trial ⚖170**

As a general rule, on grant of a new trial, the whole case is open for hearing and determination de novo and, ordinarily, the court may entertain causes of action and defenses not urged at the first trial.

Where a motion for a new trial has been sustained, the issues stand as though they had never been tried. [1] The cause is to be tried de novo. [2] The whole case, [3] including the issues of fact at the former trial, [4] is open for hearing and determination. A cause of action [5] or defense [6] not pressed or submitted to the jury at the former trial may be insisted on where it has been pleaded and not withdrawn of record or abandoned by agreement of the parties.

However, a party may not take a ground inconsistent with that taken by such party at a former trial or trials. [7] Where a plea to the jurisdiction of the person is waived and abandoned on the first trial by going to trial on the merits without insisting on it, it cannot be insisted on at the second trial. [8] Moreover, the court has discretion to decline to consider new theories asserted for the first time in a motion for a new trial. [9]

On a new trial as to one issue only, the scope of the inquiry is committed to the discretion of the trial court [10] and, even where a new trial is granted as to part of the issues, where priorities are involved, the issues may be so complicated that the effect of the order will be to reopen the case for a new trial of all the issues. [11] Moreover, where the same person sues in a different capacity on a new trial of the case, such person's waiver on the first trial is binding on the second. [12]

Ordinarily, however, the whole case is not open for hearing and determination where the order granting the new trial limits it to particular issues [13] or parties, [14] or the practice in the particular jurisdiction does not call for retrial of all the issues. [15] On a new trial for damages only, plaintiff is not restricted to recovery solely for injuries apparent at the former trial. [16]

***New trial after reference.***

As a general rule, an order for a new trial in an action at law in which a reference has been had opens for reexamination and redetermination only the issues on the exceptions to the report, [17] the rulings of the court thereon, [18] and the judgment [19] and does not necessarily go behind the order of reference [20] and the report. [21]

Footnotes

1 U.S.—Hunt v. U.S., 53 F.2d 333 (C.C.A. 10th Cir. 1931).
Ind.—Compton v. Benham, 44 Ind. App. 51, 85 N.E. 365 (1908).
Minn.—In re Widening Third St. in City of St. Paul, 178 Minn. 480, 227 N.W. 658 (1929).
Okla.—Continental Cas. Co. v. Goodwin, 1937 OK 406, 180 Okla. 365, 69 P.2d 644 (1937).

2 Ill.—Travelers Ins. Co. v. Robert R. Anderson Co., 112 Ill. App. 3d 812, 68 Ill. Dec. 336, 445 N.E.2d 1189 (1st Dist. 1983).
Mass.—Prondecka v. Turners Falls Power & Electric Co., 241 Mass. 100, 134 N.E. 352 (1922).

3 Cal.—Koyer v. McComber, 12 Cal. 2d 175, 82 P.2d 941 (1938).
N.J.—Apgar v. Cooley, 9 N.J. Misc. 674, 155 A. 377 (Sup. Ct. 1931).
Ohio—Hoyer v. Breakfield, 34 Ohio L. Abs. 416, 42 N.E.2d 718 (Ct. App. 2d Dist. Montgomery County 1941).
Pa.—McGine v. State Mut. Ben. Soc., 135 Pa. Super. 35, 4 A.2d 537 (1939).

4 Cal.—Guzman v. Superior Court, 19 Cal. App. 4th 705, 23 Cal. Rptr. 2d 585 (2d Dist. 1993).

5 Fla.—Ed Ricke & Sons, Inc. v. Green, 609 So. 2d 504 (Fla. 1992).
Mo.—Ritzheimer v. Marshall, 168 S.W.2d 159 (Mo. Ct. App. 1943).

6 Fla.—Ed Ricke & Sons, Inc. v. Green, 609 So. 2d 504 (Fla. 1992).
Mich.—Bathke v. Traverse City, 308 Mich. 1, 13 N.W.2d 184 (1944).

7 S.C.—Salley v. McCoy, 186 S.C. 1, 195 S.E. 132 (1937).

8 Ga.—Barwick v. American Mfg. Co., 27 Ga. App. 275, 108 S.E. 119 (1921).

9 Colo.—Bowlen v. Federal Deposit Ins. Corp., 815 P.2d 1013, 16 U.C.C. Rep. Serv. 2d 523 (Colo. App 1991).

10 Cal.—Spencer v. Nelson, 84 Cal. App. 2d 61, 190 P.2d 40 (1st Dist. 1948).
As to propriety of granting partial new trial, see §§ 27 to 38.

11 D.C.—Browne v. Dyson, 38 App. D.C. 5, 1911 WL 20076 (App. D.C. 1911).

12 Mo.—Ryan v. Metropolitan Life Ins. Co., 30 S.W.2d 190 (Mo. Ct. App. 1930).

13 N.Y.—Outeiral v. Otis Elevator, Inc., 220 A.D.2d 255, 632 N.Y.S.2d 73 (1st Dep't 1995).
Okla.—Continental Cas. Co. v. Goodwin, 1937 OK 406, 180 Okla. 365, 69 P.2d 644 (1937).
S.C.—Westbrook v. Hutchison, 190 S.C. 414, 3 S.E.2d 207 (1939).

14 Md.—Fertitta v. Herndon, 175 Md. 560, 3 A.2d 502, 120 A.L.R. 1317 (1939).
Pa.—Barker v. Barrett, 145 Pa. Super. 22, 20 A.2d 812 (1941).

15 Okla.—Continental Cas. Co. v. Goodwin, 1937 OK 406, 180 Okla. 365, 69 P.2d 644 (1937).

16 N.J.—Kimble v. Degenring, 116 N.J.L. 602, 186 A. 451 (N.J. Sup. Ct. 1936).

17 Mo.—Star Bottling Co. v. Louisiana Purchase Exposition Co., 240 Mo. 634, 144 S.W. 776 (1912).

18 Mo.—Star Bottling Co. v. Louisiana Purchase Exposition Co., 240 Mo. 634, 144 S.W. 776 (1912).

19 Mo.—Star Bottling Co. v. Louisiana Purchase Exposition Co., 240 Mo. 634, 144 S.W. 776 (1912).

20 Mo.—Star Bottling Co. v. Louisiana Purchase Exposition Co., 240 Mo. 634, 144 S.W. 776 (1912).

21 Mo.—Star Bottling Co. v. Louisiana Purchase Exposition Co., 240 Mo. 634, 144 S.W. 776 (1912).

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31 Emory L.J. 747

**Emory Law Journal**
Fall, 1982

Feature

# INDISCRETION ABOUT DISCRETION [a]

Henry J. Friendly [aa]



I grant you, friends, if you should fright the ladies out of their wits, they would have no more discretion but to hang us. Shakespeare, *A Midsummer Night's Dream,* Act I, Scene II.

It is a distinct privilege to inaugurate the lectures at this law school in honor of Randolph W. Thrower. It is altogether fitting and proper that the honor he now receives from his loving and delightful family should take the form of an endowed lectureship at Emory. Here he received both his undergraduate and his law degrees. Emory must already have been a good law school in 1936 to have produced a lawyer who rose to the highest rank in his profession, especially in a field as arcane, and as unintelligible to most of us, as federal tax law. He has sought to repay his debt by long service on Emory's alumni association, its board of trustees, and their executive committee. It would be supererogation for me to speak of his professional success. I stress rather that he has not conceived the responsibility of being one of the country's great tax lawyers as limited to the interests of private clients but as including service to his government as Commissioner of Internal Revenue, in which capacity he issued the now challenged ruling denying tax exempt status to schools engaging in blatant racial discrimination, and promotion of tax reform as chairman of the American Bar Association's Section of Taxation and Committee on the Formation of Tax Policy.

His public concerns have gone far beyond the law. He has been a devoted citizen not only of his country but of his state and his city. It would take too much time to catalogue all the services he has rendered. Suffice it to say that they bespeak a man conscious that ***748** great professional success entails corresponding obligations to use his talent and skills in public service. He has done this with enthusiasm and has shown rare courage when the public interest required a man of courage. A review of his career up to this point, with much lying ahead, calls to mind Justice Holmes' remark "that a man may live greatly in the law as well as elsewhere." [aaa] Some years ago I remarked to the entering class at another law school on how "large a proportion of the lay leadership in such endeavors as hospitals, education and the care of the young and the old ... is furnished by lawyers." [aaaa] Randolph Thrower is in that tradition.

## I. INTRODUCTION

After I had settled on the discretion of the trial judge as the topic for this lecture, the Supreme Court kindly supplied a splendid example with which I could start the discussion. The case is *Piper Aircraft Co. v. Reyno,* [1] decided December 8, 1981.

The suit arose out of the crash of a small airplane in Scotland. The plaintiff Reyno was legal secretary to a California lawyer; a California probate court had appointed her as administratrix of the estates of five Scottish plaintiffs who died in the crash. Defendants were a Pennsylvania corporation, Piper Aircraft Co., which had manufactured the plane, and an Ohio corporation, Hartzell Propeller, Inc., which had made the propeller. Suit was brought initially in a California state court. After removal to federal court on the basis of diverse citizenship and transfer under 28 U.S.C. section 1404, the controversy ended up in the District Court for the Middle District of Pennsylvania. There the defendants moved for dismissal on the ground that Pennsylvania

was an inconvenient forum and Scotland a convenient one. A principal reason why these two American companies regarded Scotland as more convenient was the likelihood that the Pennsylvania district court would apply rules of strict liability whereas a Scottish court would not. ***749** These same considerations made the representative of the dead Scotsmen regard Pennsylvania as highly convenient and their native Scotland as inconvenient.

After reviewing a number of factors as required by the forum non conveniens doctrine, the district court granted the motion to dismiss, on the condition that the defendants agree to submit themselves to the jurisdiction of a Scottish court.[2] The Third Circuit reversed.[3] The Supreme Court, believing that the court of appeals had held that "dismissal is never appropriate where the law of the alternative forum is less favorable to the plaintiff,"[4] granted certiorari to review that ruling of law.[5] It held that the court of appeals was wrong.[6] If the Supreme Court had stopped there and had instructed the court of appeals to reconsider the matter free from the error it had supposedly made, as would have been expected in light of the limited grant of certiorari, the decision would not have been germane to my topic. It did not. In effect it directed the court of appeals to step aside and restore the judgment of the district court. Its principal reason for doing this was stated in the following paragraph:

> The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. Here, the Court of Appeals expressly acknowledged that the standard of review was one of abuse of discretion. In examining the District Court's analysis of the public and private interests, however, the Court of Appeals seems to have lost sight of this rule, and substituted its own judgment for that of the District ***750** Court.[7]

This raises two questions. Did the paragraph accurately state the law? If it did, why should this be the law?

The Supreme Court cited two of its opinions, *Gulf Oil Corp. v. Gilbert*[8] and *Koster v. Lumbermens Mutual Casualty Co.*,[9] both written by Justice Jackson and delivered on the same day. In *Gilbert* as in *Piper* the district court had granted the motion to dismiss, the court of appeals had reversed, and the Supreme Court reversed in turn. The assertion with respect to the district court's discretion was markedly more restrained than what was to be said in *Piper*. Justice Jackson wrote: "The doctrine leaves much to the discretion of the court to which plaintiff resorts, and experience has not shown a judicial tendency to renounce one's own jurisdiction so strong as to result in many abuses."[10] Justice Jackson's criticism of the court of appeals was not that it had substituted its judgment for that of the district court but that it "took too restrictive a view of the doctrine [of forum non conveniens] as approved by this Court."[11] In *Koster,* where the district court had granted the motion, the court of appeals had affirmed, and the Supreme Court also affirmed, the opinion stated, "This Court cannot say that the District Court abused its discretion in giving weight to the undenied sworn statements of fact in defendant's motion papers, especially in view of the failure of plaintiff's answering affidavit to advance any reason of convenience to the plaintiff."[12] However, Justice Jackson immediately went on to say:

> We hold only that a district court, in a derivative action, may refuse to exercise its jurisdiction when a defendant shows much harassment and plaintiff's response not only discloses so little countervailing benefit to himself in the choice of forum ***751** as it does here, but indicates such disadvantage as to support the inference that the forum he chose would not ordinarily be thought a suitable one to decide the controversy.[13]

This sounds remarkably like the statement of a rule of law. In any event, *Koster* did not require a determination of the respective roles of the district court, the court of appeals, and the Supreme Court, since all were in accord that the motion to dismiss should be granted. The upshot of this analysis is that while *Gilbert* and *Koster* contain language giving some support to the Court's statement in *Piper,* they did not establish a principle that the court of appeals must pay almost complete obeisance to

the district court. Despite the use of the phrase "substantial deference"' in the passage quoted from its opinion, the *Piper* Court actually required much more.

Justices Brennan, White, and Stevens did not perceive the role of the court of appeals as being as limited as the majority did. Agreeing that there was no rule forbidding the granting of a motion to dismiss whenever the law of the alternate forum was less favorable to the plaintiff, Justices Stevens and Brennan would have remanded "to the Court of Appeals for further consideration of whether the District Court *correctly decided* that Pennsylvania was not a convenient forum in which to litigate a claim against a Pennsylvania company that a plane was defectively designed and manufactured in Pennsylvania."' [14] "Correctly decided"' sounds in terms of error rather than abuse of discretion; indeed the phrasing of the question gives at least a hint that these two Justices would not have felt constrained to affirm the conclusion of the district court that Pennsylvania was an inconvenient forum.

The proverbial man from Mars would wonder why in such a case the view of a single district judge should be preferred over the collective judgment of three distinguished members of a higher court, once their error of law was corrected by the Supreme Court. Why should the case not have been remanded to the court of appeals for further consideration, as Justice Stevens proposed? This was not a ***752** situation where the district court had had the benefit of observing witnesses or of having lived with the case for a long time. The issue had arisen in limine and was heard upon affidavits, and the district court's decision was governed in considerable part by questions of law. Both the district court and the court of appeals were required to determine what law the district court should hold applicable to each defendant if the trial were held in the Middle District of Pennsylvania. For esoteric reasons on which I shall not elaborate, this determination required a guess as to what a California state state court would think in regard to Hartzell. The district court concluded that a California court would think that Pennsylvania law should apply to Piper and that a Pennsylvania court would think that Scottish law should apply to Hartzell. [15] The resulting need for the court to become informed with respect to Scottish law and the danger of jury confusion were important factors in the judge's decision to dismiss. After a most thorough analysis, which would win an A+ rating in any conflict of laws examination, the court of appeals agreed that Piper's liability should be determined by Pennsylvania law [16] but held that Hartzell's liability should be determined by the similar, although somewhat stricter, law of Ohio. [17] The need for the district court to inform itself on Scottish law and the danger of jury confusion, two of the principal factors that had led it to dismiss, thus disappeared. The Supreme Court did not say the conclusion of law of the court of appeals was wrong; it held rather that assuming it was right, the district court's decision to grant the motion must be allowed to stand even if it were founded on an erroneous choice of law determination. [18]

Respectfully, I do not see why. [19] This was not the ordinary case ***753** of the inconvenient forum where the dominant considerations are the counting of the noses of witnesses, the importance of on-site inspection and the like, and there is no contention that the district court's decision was infected by an error of law. [20] As noted previously, the real fight in *Piper* had become centered on the issue whether plaintiff was to have the benefit of rules of strict liability against the two manufacturers. If the Supreme Court had decided only that the court of appeals had gone overboard in its enthusiasm to have the American strict liability rule govern suits on behalf of Scottish citizens for an airplane accident in Scotland and that the district court had been right in declining to bring that about, even though for the wrong reasons, I would not demur; indeed I might well agree. My quarrel is with the proposition that everything hinged on the choice made by the district judge. If another district judge in the Third Circuit were to view the matter as the court of appeals did in *Piper,* presumably, under the language of the Supreme Court's opinion, that choice too should stand when the issue was presented on an appeal from the final judgment, since such a choice also would be "reasonable."' The Supreme Court treated the case as if the court of appeals had been reviewing the action of an administrative agency, where indeed a reviewing court cannot substitute its judgment. But that is because, paying proper heed to the separation of powers, Congress has so directed. In contrast, the district judge and the judges of the court of appeals wear the same robes. The reviewing panel in *Piper* consisted of two former district judges, one of whom, Judge Van Dusen, happened to have had more experience with choice of law problems in cases of transfer than any other judge in

the land,[21] *754 and the third had been a seasoned practitioner. Moreover, with full respect to the district judge who wrote a thoughtful opinion, in these days of crowded dockets there is an inevitable risk of some degree of subconscious bias when decision whether to dismiss a case because of forum non conveniens is made by the judge who will have to try it if the motion is denied. I thus do not regard the rule of obeisance in the extreme form laid down by the *Piper* majority as a healthy one.

## II. WHAT IS MEANT BY DISCRETION?

Enough, for the time being, about *Piper*. Let me now examine more generally what this principle of the discretion of the district court is, what justification there is for it, how it has been used, and-perhaps I should not employ this particular verb-abused.

What do we mean when we speak of the discretion of the trial judge? Most definitions of discretion are not very helpful as applied to the problem of the power of a reviewing court. For example, Professors Henry Hart and Albert Sacks say, in their unfortunately unpublished text, *The Legal Process,* that it is "the power to choose between two or more courses of action each of which is thought of as permissible."[22] Alternatively, *Bouvier's Law Dictionary* says there is discretion when "no strict rule of law is applicable."[23] Neither formulation is very satisfying. When we are discussing the allocation of power between trial and appellate courts, I find it more useful to say that the trial judge has discretion in those cases where his ruling will not be reversed simply because an appellate court disagrees. If this be circular, make the most of it!

A good deal of confusion has been generated by failure to distinguish between two uses of the word "discretion." The one with which I primarily concern myself today, namely how far an appellate court is bound to sustain rulings of the trial judge which it disapproves but does not consider to be outside the ball park-a question of the allocation of an admitted power within the judicial system-is quite different from the question whether, as a normative *755 matter, it is wise for lawmakers to insist on rigid rules in the interest of certainty, no matter how harshly these may operate in some cases, and whether it is not better to prescribe accordion-like standards that afford the courts some dispensing powers to accomplish what they perceive to be justice.[24] To say the latter does not necessarily entail that such discretionary power should be vested predominantly in the trial court rather than in the entire judicial system. If we have been moving increasingly in the direction of seeking justice in the individual case by more general rules and grants of dispensing power, as a noted scholar believes has happened in England,[25] restrictions upon review of such decisions made by courts of first instance are increasingly unacceptable. Professor Atiyah makes the point:

> But then the concept of prima facie rules, liable to be displaced by an exercise of discretion, has, I think, important implications for the structure of a judicial system. To what extent, for example, should rights of appeal be available? Is it, perhaps, time to think seriously about our widespread use of single judges to decide issues which involve so much discretion? Again, should there not be open recognition of the fact that the wider discretions are more appropriately exercised by higher decisionmakers?[26]

## III. THE COSTS AND BENEFITS OF RECOGNIZING DISCRETION

When we look at the spectrum of trial court decisions, we find a wide variance in the deference accorded to them by appellate courts. In some instances the trial court is accorded broad, virtually unreviewable discretion, as is still the case with criminal sentencing in the federal system.[27] In others, the trial judge's decision *756 is accorded no deference beyond its persuasive power, as in the case of determinations of the proper rule of law or the application of the law to the facts. Our concern is with determinations where the scope of review falls somewhere between these extremes. How much deference should be accorded to various determinations along this continuum? Just as the answer to the constitutional inquiry "what process is due?" depends upon the costs and benefits of procedural safeguards in different instances,[28] defining the proper scope of review of trial court determinations requires considering in each situation the benefits of closer appellate scrutiny as compared to those of greater deference.

### A. *The Benefits of Full Appellate Review*

Our judicial system takes as a given the desirability of appellate review. As stated by Professor Maurice Rosenberg in the pioneering article on the discretion of the trial judge:

> A right to appeal has been traditional in this country's judicial process, even though the Constitution does not spell out an obligation to grant appeals. Even if constitutional, unreviewable discretion offends a deep sense of fitness in our view of the administration of justice. We are committed to the practice of affording a two-tiered or three-tiered court system, so that a losing litigant may obtain at least one chance for review of each significant ruling made at the trial-court level. [29]

***757** My belief in the general desirability of at least one appellate review does not reflect a view that an appellate judge is inherently more able than a trial judge. Although I have never been a trial judge, I have been privileged to know a good number whom I consider to be superior to many appellate judges; indeed there are some of such preeminent ability that I would prefer their individual judgment, even on a question of law, to that of some appellate panels which I could assemble in my imagination. The extent to which an average appellate panel may have greater legal ability than the average trial judge is due in no small part to the likelihood of its containing one or more former trial judges who, in theory and often in fact, have been drawn from the highest level of the trial bench, and have had experience in both roles. The advantages of the appellate tribunal lie primarily not in the personal qualities of its members but elsewhere.

In most cases there is, or at least ought to be, more time for research and deliberation; I say "ought to be"' since many appellate courts are now working on a treadmill because of the explosion of appeals. Counsel will have had more opportunity to develop their arguments. In many cases the trial judge's opinion will help to focus the controversy. While the trial judge usually knows more about the particular case, the appellate judge is likely to have decided more cases in the same field. One member of a panel may bring an entirely fresh insight not shared by the trial court or by counsel. Assuming that all panel members take seriously their responsibility for independent exercise of judgment, the give and take of discussion may produce a result better than any single mind could reach. Finally, collegial review tends to eliminate or curtail decisions based on impermissible factors. [30] I am not thinking of the rare cases of venality or of prejudice in its most pejorative sense, but rather of the subconscious mind-set from which few judges are immune. Probably Cardozo was, [31] but such purity is ***758** rare.

Beyond all this, broad judicial review is necessary to preserve the most basic principle of jurisprudence that "'we must act alike in all cases of like nature."DDD" [32] As Professor Rosenberg suggests, [33] that constraint should operate to provide consistency among decisions of a single judge even without appellate review. However, it does not assure consistency among decisions of different trial judges, of whom there are now over five hundred in the federal system alone. [34] It is no answer that the restrictions on review of determinations of trial judges imposed by the discretion principle exist only when cases are not exactly alike. The jurisprudential rule of like treatment demands consistency not only between cases that are precisely alike but among those where the differences are not significant. As Professor Austin Scott used to say, we cannot have one rule for a man riding a white horse on Monday and another for one riding a black horse on Tuesday-even though some old cases indicated it might be as well never to be injured on Sunday. With the volume of cases in the federal system and the consequent necessity for twelve courts of appeals with an incalculable number of different panels, and with the limited availability of Supreme Court review, [35] the goal of achieving complete consistency even within that system is unattainable. But that is no reason for not doing what we can.

### ***759** B. *The Benefits of Deference*

Although appellate review of trial court decisions protects many values we see as important, a sound judicial system also requires a good deal of deference to trial court decisions. The most notable exception to full appellate review is deference to the trial court's determination of the facts. The trial court's direct contact with the witnesses places it in a superior position to perform this task. For this reason and others, the Seventh Amendment decrees that "no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[36] This is read to mean that a federal appellate court may not reverse a judgment founded on a jury verdict if, with all questions of credibility resolved in favor of the appellee, there was a rational basis for the jury's conclusion.[37] Even when the case has been tried to a judge, Federal Rule of Civil Procedure 52(a) provides that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."[38] Yet the deference demanded by this rule, namely, that an appellate court shall not reverse unless it has "the definite and firm conviction that a mistake has been committed,"[39] requires less in the way of appellate ***760** abdication than is sometimes done-in fact was required by the Supreme Court in *Piper*-in the name of the discretion rule. One test for determining the amount of deference that should be accorded to rulings of trial courts which are neither of law[40] nor of fact, is how closely the trial court's superior opportunities to reach a correct result approximate those existing in its determinations of fact.

Another principle supporting deference to rulings of the trial court is the absence of the benefits that ordinarily flow from appellate review in establishing rules that will govern future cases. This is true in the frequent situations described by Judge Stevens, as he then was, where the factors "are so numerous, variable and subtle that the fashioning of rigid rules would be more likely to impair [the trial judge's] ability to deal fairly with a particular problem than to lead to a just result."[41]

These principles support the deference traditionally accorded to many such rulings-such pretrial matters as discovery, continuances, allowing amendments of pleadings, permitting intervention or impleader, or holding pretrial conferences; such trial matters as the nature and extent of the voir dire of the jury,[42] the conduct of counsel,[43] the length of the trial day, or the denial of continuances; ***761** and such post-trial matters as the grant or denial of a motion for a new trial.[44] Generally such rulings hinge on one or more of the factors mentioned in *Noonan v. Cunard Steamship Co.*, which include the trial judge's "observation of the witnesses [and] his superior opportunity to get 'the feel of the case."DDD"[45] In addition, some but by no means all of these rulings escape only by inches the mandate against reversal for "errors or defects which do not affect the substantial rights of the parties."'[46] I therefore do not at all disagree with the Supreme Court's reversal of a court of appeals which had reversed a district court for imposing the ultimate sanction of dismissal on a plaintiff for failure to answer written interrogatories in a timely and adequate fashion.[47] In such a case the Court appropriately observed: "The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing."'[48] The district judge must be master of how to get cases to trial, and has had opportunities for frequent observation of the offending counsel which would not emerge from a cold record. Trouble comes when words like these are applied to wholly different situations, such as *Piper* and some others I will examine later.

Beyond all this, there is a limit on the capacity of the judicial system to entertain appeals and afford retrials. In addition to the obvious burden of a retrial, the retrial itself is likely to produce new grounds for appeal; the alleged errors simply will be different.[49] ***762** Too perfectionist an attitude with respect to many sorts of claims of trial error involves the prospect of an infinite regress. There thus is a gray penumbra just beyond the boundaries of the harmless error doctrine where the discretion rule may serve the purpose, at least in civil cases, of avoiding useless reversals where there is no real prospect that a different result should be forthcoming on a new trial.

## IV. STRIKING THE BALANCE BETWEEN DEFERENCE TO DISCRETION AND FULL APPELLATE REVIEW

### A. *Deference to Discretion Is a Matter of Degree*

All agree that the rule requiring deference to the trial court's discretion is not absolute; an appellate court may reverse if discretion has been "'abused.'" Professor Rosenberg does not like the phrase "abuse of discretion.'" He says it

is used to convey the appellate court's disagreement with what the trial court has done, but does nothing by way of offering reasons or guidance for the future. The phrase "abuse of discretion'" does not communicate meaning. It is a form of ill-tempered appellate grunting and should be dispensed with. [50]

Judge Duniway of the Ninth Circuit also dislikes it, since "[i]t has pejorative connotations'" not generally appropriate; he would prefer to speak of "misuse,'" [51] as would Judge Aldisert of the Third Circuit, writing in a nonjudicial role. [52] I also dislike it since it suggests limitations upon review that often should not exist and that in fact are not respected when a court wishes to escape them. But, as Judge Duniway concedes, "it has become the customary word.'" [53] It is so embedded in hundreds of decisions, as well as in ***763** statutes, [54] that we cannot just wish it away. Rather we should recognize that "abuse of discretion,'" like "jurisdiction,'" is "a verbal coat of ... many colors.'" [55]

There are a half dozen different definitions of "abuse of discretion,'" ranging from ones that would require the appellate court to come close to finding that the trial court had taken leave of its senses to others which differ from the definition of error by only the slightest nuance, with numerous variations between the extremes. An oft-cited example of the former type is the Ninth Circuit's statement in *Delno v. Market Street Railway:* [56]

Discretion, in this sense, is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. [57]

At the other extreme is a statement by the same court, some twenty years later, without reference to the earlier one: "What we mean, when we say that a court abused its discretion, is merely that we think that it made a mistake.'" [58] Some years ago the Fifth Circuit took a rather similar view: "The term 'discretion' ... means a sound discretion, exercised with regard to what is right and in the interests of justice. And an appellate court is not bound to stay its hand and place its stamp of approval on a case when it feels that injustice may result.'" [59] Standing midway between the ***764** extremes is Judge Magruder's statement:

> "Abuse of discretion'" is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors. [60]

Judge Learned Hand had a slightly different version; the appellate court will not reverse unless "our conviction is definite'" that the decision is not "'within permissible limits.'" [61]

When I began working on this lecture, I thought these wildly different definitions of abuse of discretion could not be defended and that we ought to pick one-very likely something like Judge Magruder's-and apply it across the board. Study has led me to conclude that the differences are not only defensible but essential. Some cases call for application of the abuse of discretion standard in a "broad'" sense and others in a "narrow'" one. [62] Judge Sloviter has recently put this well:

> The justifications for committing decisions to the discretion of the trial court are not uniform, and may vary with the specific types of decisions. Although the standard of review in such instances is generally framed as "'abuse of discretion,'" in fact the scope of review will be directly related to the reason why that category or type of decision is committed to the trial court's discretion in the first instance. [63]

***765 B. *Determining the Appropriate Level of Review***

A presumptively strong case for a broad reading of "abuse of discretion"-more accurately, for complete appellate abdication-is the situation where "there is no law to apply."[64] Very few cases, however, fall into this category. Even when a statute or rule expressly confers discretion or uses the verb "may" or some similar locution, there is still the implicit command that the judge shall exercise his power reasonably. This principle must lie at the root of a series of decisions that even in a field long thought to be archetypical for the discretion of the trial judge, viz., the voir dire examination of jurors, there are certain questions which the judge must put if requested.[65] Professor Rosenberg cites as an example of a situation where there is no law to apply, the decision whether or not to allow jurors to take notes during the course of trial.[66] But why not establish some, as many states have done?[67] By the same token, I am not sure that Judge Jerome Frank had to practice the ***766** complete self-abnegation which he regretfully and uncharacteristically did in the well-known case of *Skidmore v. Baltimore & Ohio Railway.*[68] *There, after berating the trial judge for failing to require a special verdict, he ruled that the court of appeals could do nothing about it since decision lay wholly with the trial judge. Although Federal Rule of Civil Procedure 49(a) says only that "[t]he court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact,"*[69] *it does not necessarily follow that, in Judge Frank's words, the judge has "ull, uncontrolled discretion in the matter" and that he may always refuse to demand a special verdict "for any reason or for no reasons whatever."*[70] *For example, in a civil antitrust case that had taken months of trial, the refusal to require either a special verdict under Rule 49(a) or answers to interrogatories under Rule 49(b) could be considered to be such a departure from reasonableness that, at least in the absence of adequate explanation, an appellate court might reverse if it thought the losing party had suffered substantial prejudice.*

A case not far from Professor Rosenberg's hypothetical about note-taking by jurors is the decision of the Seventh Circuit in *United States v. McCoy.*[71] The court of appeals there refused to reverse a trial judge who declined the request of a jury in a criminal case for the reading of the testimony of a witness, making the remarkable comment: "'I have your request that the testimony of Mary Sleiziz be reread to you. I regret that this is not permissible. You will be required to proceed on the basis of your best recollection concerning her testimony."DDD"[72]

Initially, I must confess my failure to understand the appellate court's assertion that "[d]espite the form of his response to the jury's request, we are confident that the judge was fully aware of ***767** his authority to read excerpts from the transcript to the jury."'[73] One would indeed suppose that the judge knew this but how can one so readily disregard his express statement that he did not? Having gotten rid of this embarrassment, the Seventh Circuit upheld the trial judge on the theory, not enunciated by him, that "a judge could properly adopt and follow a routine practice of declining such requests unless supported by some extraordinary showing of need."'[74] I do not at all disapprove of rules saying that discretion will not be favorably exercised in particular classes of cases; I have held exactly that in an administrative law case[75] and have received the greatest of accolades-approval by Professor Kenneth Culp Davis.[76] However, to my mind a general rule against the granting of jury requests for the reading of testimony would fail the basic test of rationality. Surely the objective is that the jury should decide on the basis of an accurate recollection of what the witnesses said. Judges who prepare findings of fact make frequent use of the transcript to refresh and verify their recollection of testimony. On what rational basis can the nearest equivalent of this be denied to jurors save when their request is "'supported by some extraordinary showing of need?" The rule should be that such requests ought to be granted unless the judge finds that extraordinary circumstances, e.g., the length of the requested testimony or the repetitive nature of the requests, dictates otherwise-although I would have some doubt even about such exceptions. Determination of the appropriate rule in this situation is a proper subject for decision by appellate courts and should not be left for final determination by individual trial judges in each case.

### C. *Appellate Control of Discretion*

Thus far I have considered under what circumstances an appellate court should have a significant role in reviewing decisions commonly regarded as resting, to a greater or lesser degree, in the trial court's discretion. A further question concerns the most productive ***768** forms of appellate oversight. These issues are not unrelated.

Even in situations where there are strong reasons to defer to the trial court's judgment, there often will be substantial benefits from the development of generally applicable rules, with the trial court being entitled to depart from them when circumstances require. This can be accomplished by stating a principle of preference: The district judge shall, or shall not, do thus and so, unless he finds that course inappropriate. A good illustration is the change made in Federal Rule of Civil Procedure 24(b) relating to permissive intervention.[77] When Professor Rosenberg delivered his lecture,[78] the rule read:

> Permitting Intervention: The trial court may in its discretion permit a person to intervene in a pending action. In exercising its discretion the court shall consider whether there is a common question of law or fact and whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.[79]

Although Professor Rosenberg believed the second sentence to be better than nothing in affording guidance,[80] it was not very good, particularly since it implied that a trial court might permit intervention even when there was not a common question of law or fact. Now the Rule reads, so far as pertinent:

> (b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: ... (2) when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.[81]

Several important changes have been made. The application must be timely-something the district judge had not been told in so ***769** many words before. There is a general statement favorable to intervention-again something not said in the earlier version. But this is now conditioned, as a matter of law and not just as something to consider, on the existence of a common question of law or fact. A further step would be to change the last sentence to read: "The court shall not allow permissive intervention if this will unduly delay or prejudice the adjudication of the rights of the original parties.'" The word "unduly'" would still leave the trial judge room for discretion, which must be retained to permit case-by-case determination of the significance of any adverse impacts of intervention.

Another example where more could be done to define the scope of a trial court's discretion is Federal Rule of Civil Procedure 15 dealing with amendment to pleadings after the first amendment, which can be made as of right. The Rule now says that "leave shall be freely given when justice so requires.'"[82] It would seem better to say something like:

> Leave shall be given when the party shows that there was good cause for not having made the new allegations in an earlier pleading and that the adverse party will not be substantially prejudiced. In other instances leave shall be given only on a finding that justice so requires and on such terms and conditions as the court may prescribe.

Failing such a change in the Rule, appellate courts should so interpret it, giving direction to lower courts and promoting uniformity of decision[83] rather than merely affirming on the basis that discretion was not abused.

When the "you shall do it unless'" type of formulation [84] is not a realistic option because of the multiplicity of considerations bearing upon an issue, it is still useful for legislators or appellate courts ***770** to specify the factors that the trial judge is to consider. This has long been done, for example, with respect to the subject with which we began, dismissal on the ground of forum non conveniens, [85] and its cousin, transfer under 28 U.S.C. section 1404. This is less useful than articulation of a general rule because usually some factors will point in one direction and others in another, and the enumeration does not in itself explain the relative weight to be given them. Still the listing calls the trial judge's attention to the factors to be considered. If he has faithfully checked off and correctly decided each item, his determination should usually be allowed to stand. *Per contra,* if he has neglected or misapprehended items that would operate in favor of the losing party, [86] an appellate court will have sound basis for finding that discretion was abused.

Once it has been deemed appropriate to limit the range of discretion, whether through the announcement of a principle of preference or the specification of factors, it becomes necessary that the trial court articulate the basis for its decision. Otherwise it will not be possible for an appellate court to determine whether the trial court's decision rests on an application of the proper rule or the mistaken assumption of some other rule. [87] Professor Rosenberg quotes with approval a statement by Judge David Porter, then on the Ohio trial bench, that "reasons for exercising discretion should not only be spelled out so a reviewing court can tell the basis of the Court's decision, but so that counsel can know the basis of such decision.'" [88] Judge Porter thought it was "ironical that if the Court fails to do this, its chances of being affirmed are better than if the record is spelled out, and this is not as it should be.'" [89] The Third Circuit has recently suggested that Judge Porter's prophecy was wrong; rather "articulation of the reasons for the decision tends to ***771** provide a firm base for an appellate judgment that discretion was soundly exercised.'" [90] Be this as it may, the desirability of a statement of reasons is beyond contest. There are, of course, limits to the requirement that the judge state his reasons. If a judge terminates cross-examination because there has been enough, he should not have to deliver a lecture on why there has been enough. Moreover, the statement can be as informal as the judge wishes.

### D. *Discretion and the Evolution of Legal Rules*

The case for full appellate review is particularly strong when a settled practice has developed in cases of the type *sub judice* and the trial court has departed from it. In *Noonan v. Cunard Steamship Co.,* [91] the Second Circuit announced a principle that accumulated precedent at the trial court level may limit the scope of what initially was almost total discretion. Referring to Federal Rule of Civil Procedure 39(b), which says that "notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues,'" [92] we pointed to defendant's citation of eighteen reported decisions by district courts within our circuit that such a motion would not be granted when the moving party alleged nothing more than inadvertence, and plaintiff's failure to cite any to the contrary. We thought that "the settled course of decision had placed a gloss upon the Rule which a judge could no more disregard than if the words had appeared in the Rule itself.'" [93] We then went on to hold that, with this as a given, a district judge could not allow a plaintiff to achieve the same objective by permitting dismissal without prejudice under Federal Rule of Civil Procedure 41(a)(2). We had this to say:

> [T]he fact that dismissal under Rule 41(a)(2) usually rests on the judge's discretion does not mean that this is always so. ***772** Several of the most important reasons for deferring to the trial judge's exercise of discretion-his observation of the witnesses, his superior opportunity to get "the feel of the case,'" and the impracticability of framing a rule of decision where many disparate factors must be weighed-are inapposite when a question arising in advance of trial can be stated in a form susceptible of a yes-or-no answer applicable to all cases. [94]

We pointed also to three district court decisions denying leave to discontinue without prejudice under the same circumstances and none opposed save the one before us, and thought that "[t]he desirability of achieving consistency among district judges

in the same circuit on such an issue and of avoiding judge-shopping out-weighs that of appellate deference to a determination of the district judge on a preliminary procedural matter .... "[95]

Since I wrote the opinion, naturally this seems very sound to me. The rulemakers gave the district courts discretion; but after enough of them had decided always to exercise it the same way, a way that the court of appeals deemed appropriate, the channel of discretion had narrowed, and a court of appeals should keep a judge from steering outside it rather than allow disparate results on the same facts. When the rulemakers have another go at the rule, as they should periodically, they can either adopt that construction or reject it. Meanwhile, parties will know where they stand and consistency will have been achieved.

The principle announced in *Noonan* is not limited to its somewhat unusual facts. As Judge Sloviter has recently said:

> When circumstances are either so variable or so new that it is not yet advisable to frame a binding rule of law, trial courts may be given discretion until the factors important to a decision and the weight to be accorded them emerge from the montage of fact patterns which arise. Often, in time, the contours of a guiding rule or even principle may develop as the courts begin to identify the policies which should control. Thus, for example, although the selection of an appropriate ***773** remedy has been generally deemed to lie in the equitable discretion of the trial judge, after experience has accumulated the appellate courts may decide that a specific remedy should be awarded as a general rule.[96]

## V. FURTHER ILLUSTRATIONS

With the preceding framework in mind, it is useful to consider some further examples of the extent of the discretion of trial courts. The subject is so large that I can examine only a few instances. No attempt can be made at completeness. Every bundle of new opinions affords fresh instances of deference to trial court discretion which lead the reader to wonder "why" and "'how much."DD'

### A. *Preliminary Injunctions*

Perhaps the most important area where parroting the discretion phrase is likely to lead to wrong decision is the review of the grant or denial of preliminary injunctions. Over seventy years ago Judge Sanborn said, in an opinion much cited by lawyers for appellees, that "[i]t was to the discretion of the trial court, not to that of the appellate court, that the law intrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion?"[97] The books are full of statements that such action lies within the trial court's discretion.[98] ***774** For example, courts have stated that the test is not whether another district judge would have arrived at a different and presumably better result,[99] or whether the appellate court would have done what the trial judge did.[100] According to another court, not merely a simple but a "clear"' abuse of discretion is required to warrant reversal,[101] whatever that may mean.

Such expressions-I speak in that way because I am convinced that in most of the cases there would have been affirmances under a more liberal standard of review-are hard to square with others concerning the drastic effect of interlocutory injunction orders, especially orders granting temporary injunctions. It has been said that "the granting of a preliminary injunction is an exercise of a very far-reaching power, never to be indulged in except in a case clearly demanding it."'[102] Experience tells us how often the grant or denial of a temporary injunction is the end of the ball game; the parties simply cannot await the result of a full-scale trial.[103] Moreover, in the federal system, there is impressive evidence that Congress intended the courts of appeals to be a good deal more than rubber stamps in this area. The act creating the courts of appeals made the grant or continuance of

temporary injunctions an exception to the general requirement of finality. [104] Four years later Congress *775 extended the exception to include the denial of a temporary injunction. [105] If expressions such as those I have first quoted really represent the law of review of orders granting or denying temporary injunctions, Congress accomplished very little by making them an exception to the final judgment rule.

Extreme deference to the district judge would be justified if there were no equitable principles governing the grant and denial of temporary injunctions; but there are. After long endeavor to find the best possible formulation, we in the Second Circuit have come up with the following:

Preliminary injunctive relief in this Circuit calls for a showing of "(a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." [106]

Other circuits have slightly different standards. [107] While these formulations *776 are not of the same mathematical clarity as the rule against perpetuities, they have sufficient content to be susceptible of appellate enforcement. Although using traditional abuse of discretion language, the Supreme Court has stated that the district court must act "in the light of the applicable standard." [108] It is also worth noting that in another passage of the opinion with which I began this discussion of preliminary injunctions, Judge Sanborn made the more limited statement that "'where, as in the case at hand, [the trial court] ... has not departed from the equitable principles established for its guidance, its orders may not be reversed by the appellate court, without clear proof that it has abused its discretion.'" [109] If it has not so departed, why should it be reversed at all?

A favorite method used by appellate courts to avoid the discretion rule in temporary injunction cases is to find that the district court proceeded on an erroneous view of the law-either the pertinent substantive law or the standard governing the grant or denial of injunctions. While this in itself would not be much of a breach in the wall, if the district court's action is thus infected the court of appeals usually does not simply instruct that court of its error and remand, but proceeds to act on its own. [110] The Second Circuit *777 has developed another principle which, although open to analytical objection, I am willing to support since it tends toward the full review I think appropriate. This is that "[w]hen a district court renders its decision without an evidentiary hearing, an appellate court is not limited to reviewing the district court's exercise of discretion." [111] While each of these principles has its uses, I prefer the more forthright approach taken by Judge Craven for the Fourth Circuit in *Blackwelder Furniture Co. v. Seilig Manufacturing Co.* [112] He there said:

> When the grant or denial of interim injunctive relief is reviewed, it is simplistic to say or imply, as we sometimes do, that it will be set aside only if an abuse of discretion can be shown .... A judge's discretion is not boundless and must be exercised within the applicable rules of law or equity. [113]

When, after giving the factual findings the weight that is due them, an appellate court finds that a trial judge has failed to comply with the applicable standards with respect to the grant or denial of preliminary injunctions, an order granting or denying such *778 relief should be set aside not because it is an abuse of discretion but because it is wrong. [114] This is what courts of appeals often do; [115] they should be honest about it. In other words, discretion in regard to the grant or denial of preliminary injunctions should be treated as a normative rule, not an allocative one. There need be no concern that such a retraction of the discretion rule would lead to an ossification of equity; the necessary leeway is built into the governing equitable principles themselves. [116] When the trial judge has complied with these principles and adequately articulated his reasons, his decision should stand. When he has not, it will not and should not.

**B. *Declaratory Judgments***

Judicial and academic statements with respect to the discretion of the trial court under the Federal Declaratory Judgment Act can be described only as "'curiouser and curiouser.'" The Act says that "[i]n a case of actual controversy within its jurisdiction,'" with certain exceptions, a court of the United States "may declare the rights and other legal relations of any interested party seeking such declaration.'" [117] Clearly, exercise of this power is permissive rather than mandatory, but the statute does not speak at all to the question whether decision to exercise the power is vested primarily in the district judge or in the entire judicial system. To use Professor ***779** Rosenberg's terminology, [118] the Declaratory Judgment Act confers primary or decision-liberating choice but does not necessarily entail secondary discretion, which is a review-limiting concept. In the terminology I have been using, the Act states a normative principle but is not necessarily addressed to the allocation of power between trial and appellate courts.

Apparently not recognizing the difference between the two concepts, however, the courts jumped to the conclusion that the discretion conferred by the Act was vested in the trial courts subject to most limited review. In a leading early case the Fourth Circuit said that this must be a "sound'" discretion "to be reasonably exercised in furtherance of the purposes of the statute.'" [119] The Ninth Circuit, however, in the *Delno* case already cited, [120] applied the same standard that it would have applied to a ruling on the extent of cross-examination, namely, that in order to reverse, an appellate court must find that "no reasonable man would take the view adopted by the trial court.'" [121]

According to Professor Moore this is not the law, [122] and it surely should not be. Rather, he says, with citation of authority, "a sound position is that the appellate court may substitute its judgment for that of the lower court. The determination of the trial court may, therefore, be reversed where, though not arbitrary or capricious, it was nevertheless erroneous.'" [123] This is sound enough, but it means that there is no "review-limiting'" concept under the Declaratory Judgment Act and that the statements about the special discretion of the trial court on this subject are bosh. Why not state this clearly and avoid the risk that some appellate court will go wrong? [124]

***780 C. *Federal Rules of Evidence***

The Federal Rules of Evidence provide another area in which the discretion of the trial court may profitably be examined. Unlike the Federal Rules of Civil Procedure, where Professor Rosenberg counted ten or so explicit references to discretion and some thirty instances saying that the court may do thus and so, [125] the text of the Federal Rules of Evidence is more sparing in the use of the word "discretion.'" [126] Indeed, in one instance a provision expressly making exclusion discretionary was stricken. [127] However, Judge Weinstein concludes that "[i]t is doubtful that there is any difference in the degree of control over this area under Rule 403 as finally adopted and as originally drafted.'" [128] A number of rules contain the verb "may'" [129] and there are other instances where some deference to the ruling of the trial judge is dictated by the context. [130] Also, in many instances the admission or exclusion of evidence turns on the judge's determination of a preliminary question of fact, e.g., the rule permitting secondary evidence of a writing where all originals have been lost or destroyed unless the proponent lost or destroyed them in bad faith. [131] Such a determination is protected by the "'unless clearly erroneous"' provision ***781** of Federal Rule of Civil Procedure 52(a) and affirmance should be placed on that ground rather than on "'discretion."DD'

A recent opinion of the Second Circuit is an interesting example of problems about discretion that may arise under the Rules of Evidence. In *City of New York v. Pullman Inc.,* [132] New York City had sued Pullman, Inc., and Rockwell International for breach of warranty with respect to undercarriages on a large number of subway cars. [133] A serious issue was the amount of damages. The City claimed it had been obliged to purchase new undercarriages at a cost of $98 million; defendants contended that the defects could have been cured by a repair or "retrofit" which they had proposed to undertake for $36 million. [134] In support of

this position they offered an "interim" staff report of the Urban Mass Transit Administration concluding that the retrofit would have been satisfactory. [135] At trial Judge Weinfeld excluded the report as inadmissible hearsay. [136] Apparently the exclusion rested on three independent grounds: [137] (1) that because of its "interim" character the report did not come within Rule 803(8)(C), making admissible "factual findings" of public offices or agencies "resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness;" [138] (2) that the report also failed the test of Rule 803(8)(C) because "the sources of information or other circumstances indicate[d] lack of trustworthiness;" and (3) that the report was excludable under Rule 403 because the likelihood that its admission would confuse the jury and protract the proceedings outweighed its probative value. Affirming, the court of appeals began this portion of its opinion by saying:

> As with any exception to the rule against hearsay, Rule 803(8)(C) is to be applied in a commonsense manner, subject ***782** to the district court's sound exercise of discretion in determining whether the hearsay document offered in evidence had sufficient indicia of reliability to justify its admission. In applying that rule to the UMTA report, it is clear to us that the district court did not abuse its broad discretion in excluding the document as hearsay. [139]

Although fully agreeing with the result, I think this painted with too broad a brush. In my view, reference to discretion was inappropriate with respect to the first ground of exclusion. Whether the "interim" report constituted findings within Rule 803(8)(C) seems to me a classical instance of application of law to the facts. If the trial judge had been wrong in concluding "that the broad language did not embody the findings of an agency, but the tentative results of an incomplete staff investigation," [140] and there were no other adequate grounds for exclusion, the judgment would have had to be reversed. This was not a question where the trial judge has "a limited right to be wrong." [141] On the second ground, the proper reason for affirmance was not the discretion rule but the "unless clearly erroneous" provision of Federal Rule of Civil Procedure 52(a). On the other hand, reference to the discretion principle with respect to the third ground was entirely appropriate.

It would be unfortunate if the work of the Advisory Committee and the Congress in framing carefully tailored exceptions to the hearsay rule and formulating other evidentiary rules should be dissipated by a blur of undifferentiated expressions with respect to the "discretion" of the trial judge. [142] Justice Murphy's extraordinary statement that "[r] ulings on the admissibility of evidence must normally be left to the sound discretion of the trial judge in ***783** actions under the Federal Employers' Liability Act," [143] is surely not the law under the Federal Rules of Evidence-if, indeed, it ever was. [144]

## VI. CONCLUSION

The main thrust of this lecture is that there is not just one standard of "'abuse of discretion'" on the part of the trial judge. In those situations "'where the decision depends on first-hand observation or direct contact with the litigation,'" the trial court's decision "merits a high degree of insulation from appellate revision." [145] At the other extreme, when Congress has declared a national policy and enlisted the aid of the courts' equity powers in its enforcement, the Supreme Court has said that the fact that "the [trial] court's discretion is equitable in nature ... hardly means that it is unfettered by meaningful standards or shielded from thorough appellate review." [146] In some instances the need for uniformity and ***784** predictability demand thorough appellate review. In short, the "abuse of discretion" standard does not give nearly so complete an immunity bath to the trial court's rulings as counsel for appellees would have reviewing courts believe. An appellate court must carefully scrutinize the nature of the trial court's determination and decide whether that court's superior opportunities of observation or other reasons of policy require greater deference than would be accorded to its formulations of law or its application of law to the facts. In cases within the former categories, "abuse of discretion" should be given a broad reading, [147] in others a reading which scarcely differs from the definition of error. Above all, an appellate court should consider whether the lawmaker intended that discretion should be committed solely to the trial judge or to judges throughout the judicial system.

A good note on which to end is Chief Justice Marshall's statement in the *Burr* case that discretionary choices are not left to a court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[148] Although Marshall was there talking to himself as the trial judge, his remark embodies an appropriate standard for review of many "discretionary" determinations often claimed to lie beyond meaningful appellate scrutiny.

Footnotes

a Randolph W. Thrower, Lecture in Law and Public Policy, April 14, 1982.

aa Senior Judge, United States Court of Appeals for the Second Circuit; Presiding Judge, Special Court under the Regional Rail Reorganization Act of 1973. The writer wishes to acknowledge the valuable help of his law clerks, Gary Born of the University of Pennsylvania Law School Class of 1981 and Louis Kaplow of the Harvard Law School Class of 1981.

aaa O.W. HOLMES, *The Profession of the Law,* in COLLECTED LEGAL PAPERS 29, 30 (1920).

aaaa Address to the Entering Class at the University of Chicago Law School (Oct. 1964), *reprinted in* H. FRIENDLY, *On Entering the Path of the Law,* in BENCHMARKS 22, 30 (1967).

1 454 U.S. 235 (1981). Hartzell Propeller, Inc. v. Reyno, 454 U.S. 235 (1981), was decided with *Piper.*

2 Reyno v. Piper Aircraft Co., 479 F. Supp. 727, 728 (M.D. Pa. 1979).

3 Reyno v. Piper Aircraft Co., 630 F.2d 149 (3d Cir. 1980) (Adams, J.).

4 454 U.S. at 244. Only one short passage in the seventeen page opinion of the court of appeals, 630 F.2d at 163-64, suggests that the court took so doctrinaire a position; most readers would not have thought that the court had laid down such an absolute rule if the Supreme Court had not said it had.

5 450 U.S. 909 (1981), *granting cert. to,* 630 F.2d 149 (3d Cir. 1980).

6 454 U.S. at 238.

7 454 U.S. at 257 (citations omitted).

8 330 U.S. 501 (1947).

9 330 U.S. 518 (1947).

10 330 U.S. at 508 (footnote omitted). Whatever the validity in 1947 of Justice Jackson's remark about the teachings of experience, I doubt that it remains correct in 1982 when the explosion of litigation has created a strong incentive for district courts to shunt burdensome business elsewhere. *See infra* text at page 754.

11 330 U.S. at 512.

12 330 U.S. at 531.

13 *Id.* at 531-32.

14 454 U.S. at 262 (Stevens, J., dissenting, joined by Brennan, J.) (emphasis added).

15 479 F. Supp. at 734-37.

16 630 F.2d at 168.

17 630 F.2d at 171.

18 454 U.S. at 260.

19 Indeed I do not see how the court of appeals or the Supreme Court could properly have affirmed the district court if the court of appeals' choice of law ruling, something on which it clearly had full appellate power, was correct. The most that even an extreme version of the deference principle could require, under the approach taken by both courts, would be a remand to the district court for further consideration in light of the choice of law ruling made by the court of appeals. One cannot simply assume that the district court would still opt to dismiss if a principle reason for the dismissal had disappeared. *See* Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240 (1964).

20 With respect to rulings granting or denying transfer to another federal district court under 28 U.S.C. § 1404(a), which are not appealable, I adhere to my protest in A. Olinick & Sons v. Dempster Bros., 365 F.2d 439, 445-46 (2d Cir. 1966) (Friendly, J., concurring), against entertaining petitions for mandamus as a means to review the discretionary action of a district judge.

21 See Popkin v. Eastern Air Lines, Inc., 204 F. Supp. 426 (E.D. Pa.), *rev'd sub nom.* Barrack v. Van Dusen, 309 F.2d 953 (3d Cir. 1962), *rev'd,* 376 U.S. 612 (1964). *see also* Rapp v. Van Dusen, 350 F.2d 806 (3d Cir. 1965), *rev'g,* Popkin v. Eastern Air Lines, Inc., 236 F. Supp. 645 (E.D. Pa. 1964).

22 H. Hart & A. Sacks, The Legal Process 162 (1958) (unpublished manuscript).

23 BOUVIER'S LAW DICTIONARY 884 (3d rev., 8th ed. 1914).

24 *See* H.L.A. HART, THE CONCEPT OF LAW 121-32 (1961); Pound, *Discretion, Dispensation and Mitigation: The Problem of the Individual Special Case,* 35 N.Y.U. L. REV. 925 (1960).

25 Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process and the Law,* 65 IOWA L. REV. 1249, 1251-59 (1980).

26 *Id.* at 1271.

27 *See, e.g.,* United States v. Mennuti, 679 F.2d 1032 (2d Cir. 1982); United States v. Mejias, 552 F.2d 435, 447 (2d Cir.) (a sentence within the statutory maximum is not reviewable absent the possibility that it was based on material misinformation or misunderstanding concerning the defendant or on constitutionally impermissible factors), *cert. denied,* 434 U.S. 847 (1977).

28 *See* Mathews v. Eldridge, 424 U.S. 319 (1976); Frost v. Weinberger, 515 F.2d 57, 66 (2d Cir. 1975), *cert. denied,* 424 U.S. 958 (1976); Friendly, "*Some Kind of Hearing,*" 123 U. PA. L. REV. 1267, 1278-79 (1975).

29 Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above,* 22 SYRACUSE L. REV. 635, 641-42 (1971) (footnote omitted) [hereinafter cited as *Judicial Discretion*]. I have borrowed outrageously from this splendid article. Unhappily, so far as I have been able to determine, the article has had no successors except for a condensed version by Professor Rosenberg, *Appellate Review of Trial Court Discretion,* 79 F.R.D. 173 (1975), and the collection of materials and comments in Judge Aldisert's THE JUDICIAL PROCESS 142-76 (1976), which I have found useful. See also an earlier article by Professor Rosenberg, *Judicial Discretion,* 38 OHIO B. 819 (1965). The paucity of judicial and academic writings on this topic is the more surprising in light of the increasing attention that has been given to a cognate subject, review of administrative discretion, particularly in the wake of Professor Kenneth Culp Davis', *Discretionary Justice: A Preliminary Inquiry,* a subject to which he has returned in volume two of the second edition of his *Administrative Law Treatise.* See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 8:1-8:12 (1979).

30 As Professor Rosenberg puts it: "Besides, since most trial courts are manned by a single judge and appellate courts are collegial, our fondness for appellate review may also reflect a feeling that there is safety in numbers.'" *Judicial Discretion, supra* note 29, at 642.

31 *See* L. HAND, THE SPIRIT OF LIBERTY 132-33 (1952).

32 Ward v. James, [1966] 1 Q.B. 273, 294 (C.A.) (quoting Lord Mansfield in John Wilkes' case, Rex v. Wilkes, 98 Eng. Rep. 327, 335 (1770)). The same thought was expressed by Cardozo: "It will not do to decide the same question one way between one set of litigants and the opposite way between another.'" B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33 (1921).

33 *Judicial Discretion, supra* note 29, at 643.

 

34 ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1980 ANNUAL REPORT OF THE DIRECTOR, Table 3, at 3 (1980).

35 In that connection one must wonder how the *Piper* case ever got to the Supreme Court. Even if the court of appeals had taken the absolute position the Supreme Court credited it with taking, *see supra* note 4, dismissals on the ground of forum non conveniens are not very common and the damage would have been limited to the Third Circuit. The Court could at least have awaited the development of a conflict. It should abstain from review in a case like *Piper* not simply to save its time for more important cases but because of the danger that an inadequately articulated opinion may do more to engender than to diminish confusion.

36 U.S. CONST. amend. VII.

37 *See, e.g.,* Brady v. Southern Ry., 320 U.S. 476, 479-80 (1943); Williams v. United Ins. Co., 634 F.2d 813, 815 (5th Cir. 1981); Hubbard v. Faros Fisheries, Inc., 626 F.2d 196, 199-200 (1st Cir. 1980); Samuels v. Health & Hosps. Corp., 591 F.2d 195, 198 (2d Cir. 1979); Fount-Wip, Inc. v. Reddi-Wip, Inc., 568 F.2d 1296, 1300 (9th Cir. 1978); Epoch Producing Corp. v. Killiam Shows, Inc., 522 F.2d 737, 742-43 (2d Cir. 1975).

38 FED. R. CIV. P. 52(a).

39 United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Judge Jerome Frank espoused a still more liberal view of appellate review of fact finding by the trial judge when the evidence was solely documentary or in the form of depositions since the appellate court was thought to be in as good a position to find the facts as the trial court. Orvis v. Higgins, 180 F.2d 537, 539 (2d Cir.), *cert. denied,* 340 U.S. 810 (1950). Despite contrary decisions in other circuits, *See* United States v. Mountain States Constr. Co., 588 F.2d 259, 264 (9th Cir. 1978); Merrill Trust Co. v. Bradford, 507 F.2d 467, 468 (1st Cir. 1974); H.K. Porter Co. v. Goodyear Tire & Rubber Co., 437 F.2d 244, 246 (6th Cir.), *cert. denied,* 404 U.S. 885 (1971), and academic criticisms, *see* 9 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2587, at 740-49 (1971); Clark, *Special Problems in Drafting and Interpreting Procedural Codes and Rules,* 3 VAND. L. REV. 493, 505-06 (1950); Committee Note of 1955 to Proposed (But Unadopted) Amendments to Rule 52(a), *reprinted in* 5A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 52.01[7], at 2608-10 (2d ed. 1982); Wright, *The Doubtful Omniscience of Appellate Courts,* 41 MINN. L. REV. 751, 764-71, 782 (1957) (citing authorities), Judge Frank's view has become so well established in the Second Circuit as now to be taken as a given. *See, e.g.,* Coca-Cola Co. v. Tropicana Prods., 690 F.2d 312, 318 (2d Cir. 1982); Taylor v. Lombard, 606 F.2d 371, 372 (2d Cir. 1979), *cert. denied,* 445 U.S. 946 (1980); Smith v. Regan, 583 F.2d 72, 76 (2d Cir. 1978); Munters Corp. v. Burgess Indus., Inc., 535 F.2d 210, 211 n.4 (2d Cir. 1976); United States *ex rel.* Lasky v. LaVallee, 472 F.2d 960, 963 (2d Cir. 1973). However, there has been some suggestion that resort to *Orvis v. Higgins* is discretionary. *See* New York v. Nuclear Regulatory Comm'n, 550 F.2d 745, 752 (2d Cir. 1977) (relying, somewhat dubiously, on dictum in Pan American World Airways, Inc. v. Aetna Casualty & Surety Co., 505 F.2d 989, 1004 (2d Cir. 1974)). *Cf.* Pullman-Standard v. Swint, 102 S. Ct. 1781, 1797 (1982) (Marshall, J., dissenting) (approving *Orvis v. Higgins*).

40 References to rulings of "law"' include application of law to the facts.

41 United States v. McCoy, 517 F.2d 41, 44 (7th Cir.), *cert. denied,* 423 U.S. 895 (1975). For discussion of this case, see *infra* notes 71-75 and accompanying text.

42 *But see infra* text accompanying note 65.

43 *See* Napolitano v. Compania Sud Americana de Vapores, 421 F.2d 382, 386-87 (2d Cir. 1970); Pacific Gas & Elec. Co. v. Spencer, 181 Cal. App. 2d 171, 172, 5 Cal. Rptr. 75, 76-77 (Cal. Dist. Ct. App. 1960); Fitzpatrick v. St. Louis & S.F. Ry., 327 S.W.2d 801 (Mo. 1959), all discussed in *Judicial Discretion, supra* note 29, *passim.* Contrast, however, the principle that an argument of counsel may be so outrageous that an appellate court will reverse even though no objection was made at trial. *See* New York Central R.R. v. Johnson, 279 U.S. 310, 318 (1929); San Antonio v. Timko, 368 F.2d 983, 985-86 (2d Cir. 1966); Ferrara v. Sheraton McAlpin Corp., 311 F.2d 294, 297 (2d Cir. 1962) (Marshall, J.).

44 *See* Wright, *The Doubtful Omniscience of Appellate Courts,* 41 MINN. L. REV. 751, 758-63 (1957), contending that when the trial judge has refused to set aside a jury verdict as against the weight of the evidence, a federal court of appeals has no power to reverse for an abuse of discretion. *see also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 248 (1940); 6A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 59.08[5] (2d ed. 1982).

45 375 F.2d 69, 71 (2d Cir. 1967) (citations omitted) (quoting Cone v. West Virginia Pulp & Paper Co., 330 U.S. 212, 216 (1947) (Black, J.)).

46 28 U.S.C. § 2111 (1976). Such errors are described as "harmless error."DD'

47 National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642 (1976).

48 *Id.*

49 I do not mean this at all as a disparagement of trial judges. What has struck me during twenty-two years as a federal appellate judge is not that there are so many trial errors but that, particularly considering the time constraints under which trial judges labor, there are so few significant ones.

50 *Judicial Discretion, supra* note 29, at 659.

51 Pearson v. Dennison, 353 F.2d 24, 28 n.6 (9th Cir. 1965).

52 R. ALDISERT, THE JUDICIAL PROCESS 759 (1976).

53 Pearson v. Dennison, 353 F.2d at 28 n.6.

54 *See, e.g.,* the judicial review provisions of the Federal Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1976).

55 United States v. L.A. Tucker Truck Lines, 344 U.S. 33, 39 (1952) (Frankfurter, J., dissenting).

56 124 F.2d 965 (9th Cir. 1942) (discussing proper scope of review of refusal to grant declaratory judgment).

57 *Id.* at 967. See *infra* text accompanying notes 117-24 for a discussion of discretion under the Federal Declaratory Judgment Act.

58 Pearson v. Dennison, 353 F.2d at 28 n.6 (dismissal of action for failure to prosecute). Ignoring its own widely divergent views, the Ninth Circuit has recently spoken of "the abuse of discretion standard,'" Darbin v. Nourse, 664 F.2d 1109, 1114 (9th Cir. 1981), as if there were universal agreement on what it meant.

59 Commercial Credit Corp. v. Pepper, 187 F.2d 71, 75 (5th Cir. 1951) (citation omitted). The Third Circuit once contributed an especially confusing definition: "Abuse of discretion in law means that the court's action was in error as a matter of law and where such abuse exists, reversal will be ordered.'" Beck v. Wings Field, Inc., 122 F.2d 114, 116 (3d Cir. 1941) (reversing a district court's denial of motion for new trial).

60 *In re* Josephson, 218 F.2d 174, 182 (1st Cir. 1954).

61 Barnett v. Equitable Trust Co., 34 F.2d 916, 920 (2d Cir. 1929), *modified,* 283 U.S. 738 (1931). Judge Hand did not elucidate how the appellate court determines what limits are permissible.

62 By a "broad'" interpretation of the phrase "abuse of discretion,'" I mean affording expansive protection to the decision of the district court and limiting the scope of appellate review. By "narrow'" I mean narrowly protecting the decision of the district court and sustaining a wide scope of appellate review.

63 United States v. Criden, 648 F.2d 814, 817 (3d Cir. 1981) (footnote omitted).

64 The phrase comes from S. REP. NO. 752, 79th Cong., 1st Sess. 26 (1945), on the Administrative Procedure Act. Its current vogue stems from its use in Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971).

65 *See, e.g.,* Darbin v. Nourse, 664 F.2d 1109, 1112, 1114 (9th Cir. 1981) (where a prisoner brought a civil rights action against a law enforcement officer, the district court abused its discretion in refusing to ask prospective jurors whether they would view the testimony of a law enforcement officer as inherently more credible than that of a lay witness); United States v. Baldwin, 607 F.2d 1295, 1297 (9th Cir. 1979) (where the defendant was charged with stealing from government owned land, the trial court erred in refusing to ask "[w]hether any of the prospective jurors would give greater or lesser weight to the testimony of a law enforcement officer, by the mere reason of his/her position'" and "[w]hether any of the prospective jurors were acquainted with any of the prospective witnesses in the case.'"); Cook v. United States, 379 F.2d 966, 971 (5th Cir. 1967) (where the defendant was charged with willfully understating

 

his income for federal tax purposes, the trial court should have asked prospective jurors whether they were acquainted with or related to an important named government witness); Brown v. United States, 338 F.2d 543, 544-45 (D.C. Cir. 1964) (where the testimony of police officers constituted the bulk of the government's case, the trial court erred in failing to question prospective jurors as to possible predilections concerning police testimony).

66 Rosenberg, *Appellate Review of Trial Court Discretion,* 79 F.R.D. 173, 173-74 (1975).

67 The Appellate Division of the Supreme Court of New York, Second Department, has recently upheld the discretion of the trial judge to permit note-taking, subject to his giving certain instructions. People v. DiLuca, 85 A.D.2d 439, 446 (N.Y. App. Div. 1982). The Eleventh Circuit has sanctioned allowing the jury, under proper instructions, to take a taped or written charge into the jury room. United States v. Watson, 680 F.2d 1390 (11th Cir. 1982).

68 167 F.2d 54 (2d Cir.), *cert. denied,* 335 U.S. 816 (1948).

69 FED. R. CIV. P. 49(a).

70 167 F.2d at 66-67. *see also* Edwards v. Sears, Roebuck & Co., 512 F.2d 276, 294 (5th Cir. 1975); Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1100 (5th Cir. 1973); 5A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 49.03[1], at 49-10 to 49-14 (2d ed. 1982).

71 517 F.2d 41 (7th Cir. 1975).

72 *Id.* at 44.

73 *Id.* at 45.

74 *Id.*

75 Fook Hong Mak v. Immigration & Naturalization Serv., 435 F.2d 728, 730-32 (2d Cir. 1970).

76 *See* 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 8:8 (1979).

77 FED. R. CIV. P. 24(b).

78 Professor Rosenberg's lecture was delivered at the College of Law, Syracuse University, November 12 and 13, 1969.

79 *Judicial Discretion, supra* note 29, at 659.

80 *Id.* at 659-60.

81 FED. R. CIV. P. 24(b).

82 FED. R. CIV. P. 15.

83 To a considerable extent appellate courts have done so. *See* Foman v. Davis, 371 U.S. 178 (1962); S.S. Silberblatt, Inc. v. East Harlem Pilot Block, 608 F.2d 28 (2d Cir. 1979); Asay v. Hallmark Cards, Inc., 594 F.2d 692 (8th Cir. 1979); 3 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 15.08[2] (2d ed. 1982).

84 See the discussion of governing rules, guiding rules, and escape clauses in K. DAVIS, *supra* note 76, at § 8:7.

85 See *supra* notes 8-11 and accompanying text for a discussion of Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

86 *E.g.,* the need to apply Scottish law in *Piper,* as discussed *supra* at notes 1-21 and accompanying text.

87 See K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 103-06 (1969).

88 Woodruff v. Woodruff, 7 Ohio Misc. 87, 92, 217 N.E.2d 264, 268 (C.P. Miami Cty. 1965).

89 *Id.*

90 United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981).

91 375 F.2d 69 (2d Cir. 1967). *Noonan* was reaffirmed in Galella v. Onassis, 487 F.2d 986 (2d Cir. 1973).

92 FED. R. CIV. P. 39(b).

93 375 F.2d at 70.

94 *Id.* at 71 (citations omitted).

95 *Id.*

96 United States v. Criden, 648 F.2d 814, 818 (3d Cir. 1981) (citations omitted). Judge Aldisert agrees that "guides to the exercise of discretion can easily crystallize into rules of law .... " R. ALDISERT, *supra* note 52, at 753.
One wonders whether the Seventh Circuit would have reached the same result as it did in United States v. McCoy, 517 F.2d 41 (7th Cir. 1975) discussed *supra* at notes 71-74 and accompanying text, if it had been presented with evidence that other trial judges in the circuit routinely granted requests of juries to have testimony reread.

97 Love v. Atchison, Topeka & Santa Fe Ry., 185 F. 321, 331 (8th Cir. 1911). Judge Sanborn did not regard himself as establishing new doctrine; he cited a number of earlier cases and J. HIGH, INJUNCTIONS § 1696 (4th ed. rev. 1905). It would be interesting to trace the principle back to its origin. Such research might reveal that "the discretion of the chancellor'" was intended as a normative principle of equity in general rather than an allocation of power between trial and appellate courts. *See* O. FISS, INJUNCTIONS 74-76 (1972). For centuries the chancery in England was "in practice as well as in theory a one-judge court;" equity judges subordinate to the chancellor were not appointed until the nineteenth century. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 209-10 (5th ed. 1956). *See also* 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 442-44 (3d ed. 1922).

98 *E.g.,* Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975); Brown v. Chote, 411 U.S. 452, 457 (1973); Jacobson & Co. v. Armstrong Cork Co., 548 F.2d 438, 441 (2d Cir. 1977); 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 65.04[2], at 65-47 to 65-49 (2d ed. 1982).

99 *E.g.,* Columbia Pictures Indus., Inc. v. American Broadcasting Cos., 501 F.2d 894, 897 (2d Cir. 1974).

100 Hamilton Watch Co. v. Benrus Watch Co., 206 F.2d 738, 743 n.10 (2d Cir. 1953).

101 Checker Motors Corp. v. Chrysler Corp., 405 F.2d 319, 323 (2d Cir.), *cert. denied,* 394 U.S. 999 (1969).

102 Warner Bros. Pictures, Inc. v. Gittone, 110 F.2d 292, 293 (3d Cir. 1940). *see also* Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189 (4th Cir. 1977).

103 A striking example is the grant of an injunction temporarily enjoining a tender offer because of threatened violation of the antitrust laws. The ABA Antitrust Section has stated that "[i]n all reported cases but one where preliminary relief had been granted prohibiting the offeror from proceeding with a tender offer on the basis of alleged Section 7 violations, the offer has been withdrawn and a full trial on the merits has not been held.'" Monograph No. 1, THE PRIVATE SUIT: THE PRIVATE ENFORCEMENT OF SECTION 7 OF THE CLAYTON ACT 34 (1977). *See* Missouri Portland Cement Co. v. Cargill, Inc., 498 F.2d 851, 870 (2d Cir.), *cert. denied,* 419 U.S. 883 (1974). Surely such orders should be subject to full appellate review.

104 Act of Mar. 3, 1891, ch. 517, § 7, 26 Stat. 826, 828 (1891) (current version at 28 U.S.C. § 1292(a)(1) (1976)).

105 Act of Feb. 18, 1895, ch. 96, 28 Stat. 666 (1895) (current version at 28 U.S.C. § 1292(a)(1) (1976)). This was done because the implications of "the lack of all review over the action of a single judge in denying interlocutory injunctions 'had not been adequately considered."DDD" F. FRANKFURTER & J. LANDIS, THE BUSINESS OF THE SUPREME COURT 108-09 (1928).

106 Seabord World Airlines v. Tiger Int'l, Inc., 600 F.2d 355, 359 (2d Cir. 1979) (quoting Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979)). *See also,* Sperry Int'l Trade, Inc. v. Government of Israel, 670 F.2d 8, 11 (2d Cir. 1982); Buffalo Forge Co. v. Ampco-Pittsburgh Corp., 638 F.2d 568, 569 (2d Cir. 1981); Union Carbide Agricultural Products Co. v. Costle, 632 F.2d 1014, 1017-18 (2d Cir. 1980), *cert. denied,* 450 U.S. 996 (1981); Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc., 601 F.2d 48, 54 (2d Cir. 1979); Caulfield v. Board of Educ., 583 F.2d 605, 610 (2d Cir. 1978).

 

107 *See, e.g.,* Dataphase Systems, Inc. v. CL Systems, Inc., 640 F.2d 109, 113 (8th Cir. 1981) ("Whether a preliminary injunction should issue involves consideration of (1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction will inflict on other parties litigant; (3) the probability that movant will succeed on the merits; and (4) the public interest.'"); Hardin v. Houston Chronicle Publishing Co., 572 F.2d 1106, 1107 & n.2 (5th Cir. 1978) (the four requirements are "(1) substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) a showing that the injunction, if issued, would not be adverse to the public interest.'"); Blackwelder Furniture Co. v. Seilig Mfg. Co., 550 F.2d 189, 193 (4th Cir. 1977) (citing Airport Comm. of Forsyth Cty., N.C. v. CAB, 296 F.2d 95, 96 (4th Cir. 1961)) ("the fourfold equitable rule of thumb'" is 1) Has the petitioner made a *strong showing* that it is likely to prevail upon the merits? 2) Has the petitioner shown that without such relief it will suffer irreparable injury? 3) Would the issuance of the injunction substantially harm other interested persons? 4) Wherein lies the public interest?") (emphasis added by *Blackwelder* court); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977) (citing Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958)) (the factors to consider are whether the petitioner made a strong showing likely to prevail on the merits, whether the petitioner has shown it would be irreparably injured without such relief, if the issuance of a stay would substantially harm other parties interested in the proceedings, and the public interest involved). *See* 7 J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 65.04[1] (2d ed. 1982).

108 Doran v. Salem Inn, Inc., 422 U.S. 922, 931-32 (1975).

109 Love v. Atchison, Topeka & Santa Fe Ry., 185 F. 321, 331 (8th Cir. 1911).

110 *See, e.g.,* Continental Group, Inc. v. Amoco Chemicals Corp., 614 F.2d 351, 357-59 (3d Cir. 1980); Buffalo Courier-Express Inc. v. Buffalo Evening News, 601 F.2d 48, 59-60 (2d Cir. 1979); A.O. Smith Corp. v. FTC, 530 F.2d 515, 525 (3d Cir. 1976); Carroll v. American Fed'n of Musicians Union, 295 F.2d 484, 488-89 (2d Cir. 1961); Perry v. Perry, 190 F.2d 601, 602 (D.C. Cir. 1951); Ring v. Spina, 148 F.2d 647, 650 (2d Cir. 1945).
A contrary position seems to have been taken in Yuba Consol. Gold Fields v. Kilkeary, 206 F.2d 884 (9th Cir. 1953). The court of appeals there held that the district court had taken too narrow a view of its equity powers in refusing to issue a bill of peace but nevertheless less declined the appellant's suggestion that it was "in as good a position as the trial court to determine whether equity jurisdiction should be exercised.'" *Id.* at 891. Unless the record was deficient or something would be gained in the particular case by seeing and hearing witnesses, why not? Three "chancellors'" should be at least as good as one. Beyond that, a remand necessarily means further delay, including the possibility of a second appeal.

111 Forts v. Ward, 566 F.2d 849, 852 n.8 (2d Cir. 1977). *see also* Doe v. New York Univ., 666 F.2d 761, 765 (2d Cir. 1981); Crouse-Hinds Co. v. Internorth, Inc., 634 F.2d 690, 701 n.19 (2d Cir. 1980); Jack Kahn Music Co. v. Baldwin Piano & Organ Co., 604 F.2d 755, 758 (2d Cir. 1979) (Medina, J.); San Filippo v. United Bhd. of Carpenters & Joiners, 525 F.2d 508, 511 (2d Cir. 1975); Dopp v. Franklin Nat'l Bank, 461 F.2d 873, 879 (2d Cir. 1972), each formulating the principle in slightly different language. *but see* New York v. Nuclear Regulatory Comm'n, 550 F.2d 745, 750-53 & n.6 (2d Cir. 1977), in which Judge Oakes exposes the analytic difficulty that, even if an appellate court has greater freedom to review the judge's findings of fact when the record is wholly in writing, *see supra* note 39, this does not necessarily support the conclusion that when the judge's factual findings on the written record are correct, his determination whether or not to grant a temporary injunction should be subject to more intensive review than if he had heard testimony. In *Nuclear Regulatory Comm'n* and Vidal Sassoon, Inc. v. Bristol-Myers Co., 661 F.2d 272, 276 n.9 (2d Cir. 1981), the court indicated that use of the power to reverse for other than abuse of discretion is itself discretionary. This seems to introduce a new element of confusion. The "guidelines'" proposed in *Nuclear Regulatory Comm'n* are sensible factors for consideration on the merits rather than in determining the scope of review.

112 550 F.2d 189 (4th Cir. 1977).

113 *Id.* at 193.

114 Perhaps more palatably, unless and until 28 U.S.C. § 1292(a) is appropriately amended, a court of appeals could use one of the narrow definitions of abuse of discretion such as that in Pearson v. Dennison, 353 F.2d 24 (9th Cir. 1965), *see supra* note 51 and accompanying text, or cite Judge Craven's language in *Blackwelder,* 550 F.2d 189 (4th Cir. 1977), *see supra* note 113 and accompanying text.

115 See, as one example, Warner Bros., Inc. v. Gay Toys, Inc., 658 F.2d 76 (2d Cir. 1981), where the court unceremoniously reversed the denial of a temporary injunction without a word about abuse of discretion. The omission could not have been inadvertent; the

opinion was written by Chief Judge Re of the United States Court of International Trade, author of *Cases and Materials on Equity and Equitable Remedies.*

116 *See supra* note 97 and accompanying text. A situation different from but closely related to the grant or denial of preliminary injunctions is the discretion of the trial court to withhold a permanent injunction as unnecessary even when the plaintiff has made out all other elements of his case. The landmark decision is Hecht Co. v. Bowles, 321 U.S. 321 (1944). Here too the willingness of appellate courts to uphold rulings of district judges rests in no small measure on the latters' superior ability to find the facts when live testimony has been taken. *See* SEC v. Bausch & Lomb, Inc., 565 F.2d 8, 18-19 (2d Cir. 1977).

117 28 U.S.C. § 2201 (Supp. V 1981).

118 *Judicial Discretion, supra* note 29, at 638.

119 Aetna Casualty Co. v. Quarles, 92 F.2d 321, 325 (4th Cir. 1937) (Parker, J.).

120 Delno v. Market St. Ry., 124 F.2d 965, 967 (9th Cir. 1942).

121 *Id.* at 967.

122 6A J. MOORE, MOORE'S FEDERAL PRACTICE ¶ 57.08[2] (2d ed. 1982).

123 *Id.* at 57-37 (footnotes omitted).

124 *See* Broadview Chemical Corp. v. Loctite Corp., 417 F.2d 998, 1000 n.3 (2d Cir. 1969) (while taking Professor Moore's approach, cited *Delno* as in accord), *cert. denied,* 397 U.S. 1064 (1970). With similar fine impartiality, 10 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2759, at 791 (1973), cites both *Broadview* and *Delno* under the heading "substitute judgment.'" *Id.* at 791 n.34.

125 *Judicial Discretion, supra* note 29, at 655.

126 The most important use is in Federal Rule of Evidence 611(b), with respect to the scope of cross-examination. The Advisory Committee accompanied this with a warning that, "[t]he matter is ... not one in which involvement at the appellate level is likely to prove fruitful.'" FED. R. EVID. 611(b) advisory committee note. *See also* FED. R. EVID. 201(c), 206(c), 608(b), 612.

127 Draft Fed. R. Evid. 4.03(b), 51 F.R.D. 345 (1971), now FED. R. EVID. 403.

128 1 J. WEINSTEIN & M. BERGER, COMMENTARY ON RULES OF EVIDENCE FOR THE UNITED STATES COURTS ¶ 403[02], at 403-16 (1982).

129 *E.g.,* FED. R. EVID. 103(b), 201(c), 609(d), 614.

130 Examples, not intended to be exclusive, are Rule 401 (Definition of Relevant Evidence), Rule 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time), Rule 611(a) (Mode and Order of Interrogation and Presentation), Rule 614 (Calling and Interrogation of Witnesses by Court), Rule 706 (Court Appointed Experts), Rules 803(24) and 804(b)(5) (catch-all hearsay exceptions). As to Rule 403, see United States v. Robinson, 560 F.2d 507, 514-16 (2d Cir. 1977) (en banc) (and cases cited therein) (emphasizing the special advantages possessed by the district judge); 1 J. WEINSTEIN & M. BERGER, *supra* note 128, at ¶ 401[01]. On the other hand, the context makes clear that not every rule including the word "may'" was meant to confer discretion. *See, e.g.,* FED. R. EVID. 607 (Who May Impeach); FED. R. EVID. 608(a) (opinion and reputation evidence of character).

131 FED. R. EVID. 1004(1).

132 662 F.2d 910 (2d Cir. 1981), *cert denied sub nom.* Rockwell Int'l Corp. v. New York, 454 U.S. 1164 (1982).

133 662 F.2d at 913.

134 *Id.* at 915-16.

135 *Id.* at 913-14.

136 *Id.* at 913.

137 *See id.* at 914-15.

138 FED. R. EVID. 803(8)(C).

139 662 F.2d at 914 (citations omitted).

140 *Id.* at 915.

141 1 J. WEINSTEIN & M. BERGER, *supra* note 128, ¶ 401[01], at 401-7 (citing Rosenberg, *Judicial Discretion,* 38 OHIO B. 819, 823 (1965)).

142 *See, e.g.,* Lambert v. Morania Oil Tanker Corp., 677 F.2d 245, 249 (2d Cir. 1982) ("We find no merit in appellant's attack on the district court's evidentiary rulings, which were made in the exercise of the court's broad discretion.'") (citing Miller v. New York Produce Exch., 550 F.2d 762 (2d Cir.), *cert. denied,* 434 U.S. 823 (1977)); Miller v. New York Produce Exch., 550 F.2d 762, 769 (2d Cir.) (The admission into evidence of an official document was "'within the broad discretion of the District Court.'"), *cert. denied,* 434 U.S. 823 (1977).

143 Lavender v. Kurn, 327 U.S. 645, 654 (1946).

144 Another of the many topics warranting analysis is the principle that prejudgment interest in admiralty rests in the "broad discretion'" of the district court. *See, e.g.,* Independent Bulk Transport, Inc. v. The Vessel "'Morania Abaco,"' 676 F.2d 23 (2d Cir. 1982); Red Star Barge Line, Inc. v. Wassau County Bridge Auth., 683 F.2d 42 (2d Cir. 1982). I should suppose the principle ought to be that such interest should be awarded except to the extent that the plaintiff had been guilty of outrageous and inexcusable delay. Isn't this what the court of appeals really meant? If so, why not say so?

145 United States v. Criden, 648 F.2d 814, 817-18 (3d Cir. 1981).

146 Albemarle Paper Co. v. Moody, 422 U.S. 405, 416 (1975). In a unanimous opinion by Justice Stewart, the Court concluded:
It follows that, given a finding of unlawful discrimination, backpay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination. The courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives, while at the same time recognizing that the trial court will often have the keener appreciation of those facts and circumstances peculiar to particular cases.
*Id.* at 421-22 (footnote omitted).
In Ford Motor Co. v. EEOC, 102 S. Ct. 3057 (1982), the Court divided over the scope of this principle. The issue, as stated by Justice O'Connor for the majority, was whether an employer may toll the continuing accrual of backpay "'simply by unconditionally offering the claimant the job previously denied, or whether the employer also must offer seniority retroactive to the date of the alleged discrimination."' *Id.* at 3060. The majority held that "absent special circumstances'" the former sufficed. *Id.* at 3069. Justice Blackmun, dissenting on behalf of three Justices, argued that this impacted unduly on the discretion of the district courts. In my view, whatever the merits of the basic controversy, this is the kind of issue on which an appellate court should lay down a rule, to be departed from only in special circumstances; employers and employees should know where they stand when the offer is made.

147 *See supra* note 62.

148 United States v. Burr, 25 F. Cas. 30, 35 (C.C. Va. 1807) (No. 14,692d).

# Tobacco-Related Cancers Fact Sheet

- Lung cancer is the leading cause of cancer death in the United States for both men and women. (Source: *Cancer Facts & Figures 2013*)
- Lung cancer is the most preventable form of cancer death in our society. (Source: *Cancer Facts & Figures 2013*)
- Lung cancer estimates for 2013 (Source: *Cancer Facts & Figures 2013*):
  - **New cases of lung cancer:** 228,190
    Males: 118,080
    Females: 110,110
  - **Deaths from lung cancer:** 159,480
    Males: 87,260
    Females: 72,220
- Besides lung cancer, tobacco use also increases the risk for cancers of the mouth, lips, nasal cavity (nose) and sinuses, larynx (voice box), pharynx (throat), esophagus (swallowing tube), stomach, pancreas, kidney, bladder, uterus, cervix, colon/rectum, ovary (mucinous), and acute myeloid leukemia. (Source: *Cancer Facts & Figures 2013*)
- In the United States, tobacco use is responsible for nearly 1 in 5 deaths; this equals about 443,000 early deaths each year. (Source: *Cancer Facts & Figures 2013*)
- Tobacco use accounts for at least 30% of all cancer deaths and 87% of lung cancer deaths. (Source: *Cancer Facts & Figures 2013*)
- Cigarette use has declined dramatically since the release of the first US Surgeon General's Report on Smoking and Health in 1964. Even so, about 21.6% of men and 16.5% of women still smoked cigarettes in 2011, with about 78% of these people smoking daily. (Source: *Current cigarette smoking among adults – United States, 2011*)
- Cigarette smoking among adults age 18 and older who smoked 30 cigarettes or more a day went down significantly from 2005 to 2011 – from 12.6% to 9.1%. But the number of adults who smoke 1 to 9 cigarettes a day went up during this same time – from 16.4% to 22%. And still, nearly 44 million American adults smoke. (Source: *Current cigarette smoking among adults – United States, 2011*)
- Cigars contain many of the same carcinogens (cancer-causing substances) found in cigarettes. Between 1997 and 2007, sales of little cigars had increased by 240%, while large cigar sales decreased by 6%. Cigar smoking causes cancers of the lung, mouth, throat, larynx (voice box), esophagus (swallowing tube), and probably the pancreas. (Source: *Cancer Facts & Figures 2013)*
- Little cigars are about the same size and shape as cigarettes, come in packs of 20, but unlike cigarettes, they can be candy or fruit flavored. In most states, they cost much less than cigarettes, making them affordable to youth. A 2011 CDC survey found that about 24% of 12$^{th}$ grade boys and about 10% of the 12$^{th}$ grade girls had smoked cigars in the past 30 days. (Sources: *Cancer Facts & Figures 2011; CDC Youth Risk Behavior Surveillance — United States, 2011*)

- In 1997, nearly half (48%) of male high school students and more than one-third (36%) of female students reported using some form of tobacco – cigarettes, cigars, or smokeless tobacco products – in the past month. The percentages went down to 28% for male students and 18% for female students in 2011. But among $12^{th}$ graders, 37% of the boys and 25% of the girls had used tobacco in the past month. (Sources: *Cancer Facts & Figures 2010; CDC Current Tobacco Use Among Middle and High School Students – United States, 2011; CDC Youth Risk Behavior Surveillance — United States, 2011)*

- Each year, about 3,400 non-smoking adults die of lung cancer as a result of breathing secondhand smoke. Each year secondhand smoke also causes about 46,000 deaths from heart disease in people who are not current smokers. (Source: *Cancer Facts & Figures 2013*)

- Among adults age 18 and older, national data from 2010 showed 5% of men and less than 1% of women were current users of smokeless tobacco. Nationwide, about 13% of US male high school students and more than 2% of female high school students were using chewing tobacco, snuff, or dip in 2011. (Sources: *Cancer Facts & Figures 2012; CDC Youth Risk Behavior Surveillance — United States, 2011)*

- Smokeless tobacco products are a major source of cancer-causing nitrosamines and a known cause of human cancer. They increase the risk of developing cancer of the mouth and throat, esophagus (swallowing tube), and pancreas. (Source: *Cancer Prevention & Early Detection Facts and Figures 2010*)

- Smokeless tobacco products are less lethal but are not a safe alternative to smoking. Using smokeless tobacco can lead to nicotine addiction. Use of tobacco in any form harms health. (Source: *Cancer Prevention & Early Detection Facts and Figures 2010*)

- Between 2000 and 2004, smoking caused more than $193 billion in annual health-related costs in the United States, including smoking-attributable medical costs and productivity losses. (Source: *Cancer Facts & Figures 2013*)

Last Medical Review: 11/09/2012
Last Revised: 01/17/2013

**CERTIFICATE OF SERVICE**

I certify that, on this 21 day of March, 2014, I served a true and correct copy of the foregoing on:

Richard N. Shapiro
Shapiro, Lewis, Appleton & Favaloro, P.C.
1294 Diamond Springs Road
Virginia Beach, VA 23455

Sidney W. Gilreath
Cary Bauer
Gilreath & Associates
550 Main Street, Suite 600
Knoxville, TN 37911

Emily L. Herman-Thompson