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HANDLING EXPERTS AND USING OHIO'S *DAUBERT* LAW TO YOUR ADVANTAGE

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1. **Ohio Trial Judges Are Gatekeepers**. "This gatekeeping function imposes an obligation upon a trial court to assess both the reliability of an expert's methodology and the relevance of any testimony offered before permitting the expert to testify. We adopted this role for Ohio trial judges in *Miller v. Bike Athletic Co.,* 80 Ohio St.3d 607 (1998)." *Terry v. Caputo,* 115 Ohio St.3d 351, 2007-Ohio-5023, ¶ 24 (citing *Kumho* in the preceding sentence, and again a few paragraphs later, indicating an adoption of the standard in *Kumho* as well as that of *Daubert*).

2. **Focus is on Methods Not Conclusions**. "Thus, a trial court's role in determining whether an expert's testimony is admissible under Evid. R. 702(C) focuses on whether the opinion is based upon scientifically valid principles, not whether the expert's conclusions are correct or whether the testimony satisfies the proponent's burden of proof at trial." *Miller v. Bike Athletic Co.,* 80 Ohio St.3d 607, 613-14 (1998).

3. **It's Not What You Know, But How You Know It**. "[W]e are not concerned with the substance of the experts' conclusions; our focus is on how the experts arrived at their conclusions." *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶ 16 (citing *Joiner*, the court affirmed the exclusion of an expert because there was too great an "analytical gap" between the data relied upon and the opinion offered).

4. **Differential Diagnosis Is Not a Sufficient Method Without Showing General Causation**. "'Differential diagnosis' describes the process of isolating the cause of a patient's symptoms through the systematic elimination of all potential causes. Although differential diagnosis is a standard scientific method for determining causation, its use is appropriate only when considering potential causes that are scientifically known." *Valentine v. Conrad*, 110 Ohio St.3d 42, 2006-Ohio-3561, ¶ 22 (citations omitted) (affirming exclusion of expert testimony that exposure to various chemicals in the workplace was what caused plaintiff's brain cancer).

5. **Two Step Causation Analysis in Toxic Torts**. "To present a prima facie case involving an injury caused by exposure to mold or other toxic substance, a claimant must establish (1) that the toxin is capable of causing the medical condition or ailment (general causation), and (2) that the toxic substance in fact caused the claimant's medical condition (specific causation)." *Terry v. Caputo,* 115 Ohio St.3d 351, 2007-Ohio-5023, ¶ 15.

6. ***Daubert* Hearing Not Required**. "To the extent that Sliwinski argues that a trial court must always hold a *Daubert* hearing prior to the testimony of an expert, the law does not support her argument." *Sliwinski v. Village of St. Edwards*, 2014 WL 5358284, 2014-Ohio-4655, ¶ 15 (9th Dist.) (citing *Kumho*, 526 U.S. 137).

7. ***Kumho's* Intellectual Rigor Standard.** "Although the Supreme Court expressly limited its discussion in *Daubert* to the context of scientific expert opinion, the trial court's gatekeeping function is not limited to expert opinion of a scientific nature. Rather, the United States Supreme Court extended the trial court's gatekeeping responsibilities to cover nonscientific expert evidence in *Kumho Tire Co.,* . . . the trial court fulfills its gatekeeping function by 'mak[ing] certain

that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'" *State Farm Mut. Auto Ins. Co. v. Anders*, 197 Ohio App.3d 22, 2012-Ohio-824, ¶ 40 (10th Dist.) (quoting *Kumho*, 526 U.S. at 152).

8. **Adopting *Kumho's* Expanded Discretion.** "A trial court possesses the same 'latitude in deciding how to test an expert's reliability . . . as it enjoys when it decides whether or not that expert's relevant testimony is reliable.' In some cases, 'the relevant reliability concerns may focus upon personal knowledge or experience.'" *State Farm Mut. Auto Ins. Co. v. Anders*, 197 Ohio App.3d 22, 2012-Ohio-824, ¶ 41 (10th Dist.) (quoting *Kumho*, 526 U.S. at 152, and affirming admissibility of testimony from accident reconstruction expert based upon experience, training, and a review of pictures, the police report, and witness testimony); see also *Sliwinski v. Village of St. Edwards*, 2014 WL 5358284, 2014-Ohio-4655 (9th Dist.).

9. **Standard of Care Opinions.** "[A] review of medical records in a medical malpractice action, such as was performed here by [the experts], coupled with their experiences, are appropriate principles and methodologies to be used by a physician expert in forming medical opinions." *Sliwinski v. Village of St. Edwards*, 2014 WL 5358284, 2014-Ohio-4655, ¶ 14 (9th Dist.). (affirming admission of expert testimony on breach of the standard of care by a nursing home).

10. **No Epidemiological Evidence Required.** "There is no requirement under Evid. R. 702(C) that a causation opinion be backed by a specific epidemiological study." *Walker v. Ford Motor Co.*, 2014 WL 4748482*9, 2014-Ohio-4208, ¶ 35 (8th Dist.) (affirming admissibility of expert testimony connecting asbestos exposure to Hodgkin's lymphoma).

11. ***Daubert* Factors Do Not Apply To All Experts.** "[T]he *Daubert* factors (peer review, publication, potential error rate, etc.) do not apply to this kind of testimony. The court recognized that unlike scientific testimony, expert testimony about gangs depends heavily on the expert's knowledge and experience rather than on the expert's methodology and theory." *State v. Drummond*, 111 Ohio St.3d 14, 2006-Ohio-5084, ¶ 119 (citing *United States v. Hankey*, 203 F.3d 1160, 1169 (9th Cir. 2000)).

12. ***Daubert* and Novel Scientific Theories.** There is a line of Ohio cases which hold that a "*Daubert* analysis" only applies to novel scientific and medical testimony. This is a significant departure from federal case law. Regardless, Ohio appellate courts have still conducted an analysis of reliability in these cases, which end up looking very similar to *Kumho's* intellectual rigor approach to reliability. Hopefully, the Supreme Court of Ohio clarifies this issue for Ohio's trial courts.

i. "*Daubert's* application to Evid.R. 702 appears to be limited to cases in which there are novel scientific theories." *Goddard v. Children's Hosp. Medical Center*, 1996 WL 312474*3 (1st Dist. 1996) (citing Weissenberger's Ohio Evidence (1996) 302, Section 702.6). "But this is not a *Daubert* case." *Eve v. Johnson*, 1998 WL 754320*3 (1st Dist. 1998) (reversing the trial court's exclusion of defendant's orthopedic expert who testified to the absence of soft tissue damage).

ii. In a medical malpractice case involving a perforated rectum, the Sixth District Court of Appeals stated: "This is not a novel scientific theory requiring a *Daubert* analysis. We agree with the First District Court of Appeals that despite Evid.R. 702(C)'s language, not

all scientific or medical opinions require a *Daubert* analysis such as the one that the Ohio Supreme Court held was necessary in *Valentine.*" *Theis v. Lane*, 2013 WL 791871*4, 2013-Ohio-729, ¶ 16-17 (6th Dist.) (reversing the exclusion of plaintiff's expert and stating, "this court concludes that review of the medical records by a physician with experience, education, and training pertinent to the subject on which the medical malpractice claim is premised renders his testimony reliable and admissible.").

iii. "Evid. R. 702(C) does not explicitly require an expert to rely on scientific or medical literature for his or her testimony to be deemed reliable. A physician's experience, without further supporting medical literature, may, under certain circumstances, supply the foundation for a reliable expert opinion. However, this generally applies only in cases in which the scientific theory upon which the opinion rests is not a novel one requiring a *Daubert* analysis." *Walker v. Ford Motor Co.*, 2014 WL 4748482*9, 2014-Ohio-4208, ¶ 35, n.6 (8th Dist.); see also *Kinn v. HCR ManorCare*, 998 N.E.2d 852, 2013-Ohio-4086 (6th Dist.) (affirming exclusion of "novel" expert testimony in a medical malpractice claim brought against a hospice worker); *Blinn v. Balint*, 2014 WL 3530975, 2014-Ohio-3114 (9th Dist.) (affirming admissibility of orthopedic expert who did not examine the plaintiff and did not review a key X-ray, but whose opinion was based upon a review of the medical records and an MRI scan).

10 Takeaways For *Daubert*

#1 – **It's all about the Judge.** This is far and away the most important thing that I have learned. Because the trial court has such powerful discretion, the judge must accept your case and your experts as legitimate. To make sure this happens, you should try to teach the judge the science of the case at every opportunity – in the complaint, in motions to compel, at hearings, in *Daubert* and summary judgment motions, etc. Most judges (like people in general) learn better when information is accompanied by pictures and illustrations. Use them every chance you get.

#2 – **Choose Experts Wisely**. Because *Daubert* is all about trustworthiness, your expert's qualifications become extremely important. A well-qualified expert, with relevant experience outside of litigation, will carry a lot of weight with most judges. You can rely heavily on this experience in defending *Daubert* motions.

#3 – **Provide Materials To Experts Early and Often**. Give your expert all materials, depositions, medical records, etc. as early as possible. It's a terrible feeling to be in a deposition and listening to the defense attorney run down a litany of medical records your expert did not review. (You can do the same to the defense expert.)

#4 – **Create Visual Aids**. Get your expert to create pictures/diagrams/illustrations/3D-models to help explain the expert's opinions. Expert opinions are much easier to understand when they are supported by visual aids; they will also seem more trustworthy.

#5 – **Utilize Expert Reports**. While there is no requirement in most states for your expert to create an expert report, you may want to have your expert do so anyway. It will help the judge understand the expert's opinions much better than a deposition transcript. Make sure the report includes a caveat about amending the opinions based upon new information being provided to the expert. The caveat should also ask the defendant to provide the expert with any materials the

defendant would like your expert to consider. Then at deposition or at trial, when the defense attorney says, "but, you didn't you consider XYZ," your expert can at least say – "well, I did ask you to give me any information you wanted me to consider."

#6 – **Stipulate to Confidentiality of Draft Reports**. While drafts of expert reports are not discoverable in federal court, they are completely discoverable in most state courts. In Ohio, draft reports are not discoverable pursuant to Ohio Civ. R. 26(B)(5)(c). If you are handling a case in a state that allows discovery of expert reports, you may be able to stipulate with defense counsel at the beginning of a case that all communication and drafts regarding expert reports will not be discoverable. Confidentiality of draft reports is important because most experts do not know how to write a *Daubert*-proof report. They will need your help to do so, even if it's just providing an outline of what to include.

#7 – **Depositions of Your Experts**. You must take an active role at the deposition of your expert and walk your expert through the materials the expert reviewed and relied upon, the methodology the expert employed, and how the conclusions were derived from the methodology. Have the expert talk about how the method employed is similar to how the expert conducts work in his or her professional life.

#8 – **Supplementing the Deposition**. If your expert deposition does not go as smoothly as you would have hoped, you can supplement your expert's opinion with an affidavit from the expert. But, make sure that the affidavit only clarifies and does not contradict the deposition testimony. Or, after a *Daubert* motion is filed, you can request a *Daubert* hearing for your own expert, offering the judge the opportunity to speak directly to your expert.

#9 – **Defending *Daubert* Motions**. Again, the focus here should be on the judge and what the judge needs to understand. Use visual aids wherever possible; you can embed them right in the text. Make your motions short and concise. I usually start out all *Daubert* motions with a brief synopsis of why the overall case has merit. Attaching a new affidavit to your response to a *Daubert* motion can also be helpful, as long as the affidavit only helps refute the defendant's arguments in the *Daubert* motion and does not contain new opinions.

#10 – **Motion to Admit Expert Testimony.** You can file what in essence is a preemptive *Daubert* motion – a motion to admit the testimony of your expert. You have the burden of proof so you can make an affirmative showing to the court whenever you feel you ready to do so instead of waiting for the opposing party to file one at the last minute. This also provides you with an opportunity to file a reply brief after the opposing party has responded to your motion. Also – the Third Edition of the Reference Manual on Scientific Evidence is an invaluable resource. Just Google it, download it, and use it.

10 Items To Be Included in Your Expert's Report

1. Summary/Roadmap of opinions.
2. Expert's Qualifications. Elaborate. Elaborate. Elaborate.
3. List of case specific materials provided to and reviewed by the expert so the judge knows the opinions are based upon "sufficient facts and data." Be specific and thorough. Also list any other materials/sources relied on or referenced by the expert.

4. Background information on the science involved in the case. Educate the judge.
5. Step by step narrative of the work and analyses the expert performed in the case. The judge should be able to see and follow the expert's thought process. Include pictures, graphs, charts, etc., wherever possible.
6. Discussion of consideration and rejection of alternative explanations.
7. Citations to (and discussion of) publications and authority that support the opinions.
8. Explanation of how the method used to reach the opinions in the case would have been acceptable in the field and that people in the field would have relied upon the opinions reached in this manner.
9. Concise statement of each and every opinion – and sub-opinions, if any – and use appropriate language as necessary depending on burden (e.g., "more likely than not").
10. Expert's CV, bills for the case, and history of testimony attached as exhibits to the report.