BY SCOTT L. MANDEL

Scientific Expert Witnesses

Admitting and challenging them in Michigan courts

This author was recently defending a products liability case alleging design defects on the part of the manufacturer. The plaintiff had retained a highly qualified engineering expert who boasted advanced engineering degrees and an impressive work history.

After questioning that expert about his background and qualifications, counsel asked about the basis for his opinion that the machine he was criticizing was defectively designed. Not surprisingly, the expert countered by relying upon his engineering experience. When questioned as to whether he relied upon any published authorities in support of his opinions, the expert candidly conceded that he had done no such review and, therefore, could not make that claim. The expert also agreed that his opinions had not been subjected to any form of peer review, and he did not know whether those opinions were consistent with generally recognized standards of methodology. Nor did he know the potential error rate with respect to his opinion.

Since this was not a federal case, the plaintiff's counsel did not appear to have any concerns about his expert's qualifications, apparently believing that *Daubert v Merrell Dow Pharmaceuticals, Inc*,[1] establishing these standards for admissibility of scientific expert testimony, was inapplicable.

The plaintiff's counsel was unaware of the surprisingly underutilized statutory adoption of the *Daubert* criteria in MCL 600.2955. This statute assigns to Michigan trial courts the "gatekeeper" function established by *Daubert*. The Michigan legislature has mandated that expert testimony that does not meet the criteria established by this statute is inadmissible. The factors that the trial court must consider in performing its gatekeeper function under MCL 600.2955(1) are:

(a) Whether the opinion and its basis have been subjected to scientific testing and replication.

(b) Whether the opinion and its basis have been subjected to peer review publication.

(c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.

(d) The known or potential error rate of the opinion and its basis.

(e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.

(f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.

(g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.

The apparent paucity of attorneys utilizing this provision is demonstrated by the limited case law applying its provisions. That authority, however, underscores the importance of being familiar

with this statute before counsel seeks to admit or challenge scientific expert testimony.

Safeco Insurance Company of America[2] affirmed the trial court's grant of the defendant's motion for directed verdict in a products liability case where the plaintiff was asserting that a fire was caused by a furnace designed by the manufacturer. The trial court's ruling that the plaintiff's electrical engineer's testimony was not based on reliable scientific evidence required to satisfy the criteria promulgated by MCL 600.2955(1) was affirmed. *Safeco* explained that by adopting this statute, the Michigan legislature was assigning to the trial court the role of determining, pursuant to the *Daubert* criteria, whether the proposed scientific opinion is sufficiently reliable for jury consideration. The *Safeco* court relied upon *Greathous v Rhodes*,[3] recognizing that the enactment of this statute was an apparent effort by the Michigan legislature to codify *Daubert*.

Safeco, in essence, announced that the statutory criteria for admitting expert scientific testimony must be adhered to before that testimony can be admitted into evidence. That pronouncement proved to be critical in the counsel's defense of the above-described products liability action. There, the trial court, after reviewing the transcript from the plaintiff's expert's deposition, ruled that these statutory predicates had not been met. As a result, the plaintiff was precluded from introducing that expert's testimony into evidence. Based upon admissions obtained from the plaintiff herself that she did not know the cause of the accident, the trial court granted the defendant manufacturer's motion for summary disposition.

It should be noted that advocates wishing to avoid the potentially draconian effects of failing to satisfy this statutory requirement can argue that it has been recognized that this statute is not a rule of evidence and does not displace those rules.[4]

The court of appeals, in another unpublished decision, *Moore v Cerling*,[5] affirmed the trial court's permitting an expert to testify notwithstanding a challenge under this statute. The expert in *Moore* testified in the area of biomechanics, which the *Moore* court explained was not novel scientific evidence. The *Moore* court rejected the argument that expert's testimony was scientifically unreliable under MCL 600.2955(1), reasoning that the statute was not a rule of evidence and did not displace the rules of evidence. *Moore* concluded that under MRE 702, as long as the basic methodology and principles employed by the expert to reach a conclusion are sound and create a trustworthy foundation where the conclusion reached, the expert testimony is admissible.[6]

While appellate authority may not be entirely settled in this area, there has been a recognition that the federal standards for admissibility of scientific expert testimony set forth in *Daubert* have arrived in Michigan.

Parties utilizing expert testimony in scientific fields should take care to prepare their experts for being able to withstand the scrutiny of these statutory factors. Counsel seeking to defend against an opponent's expert should carefully review these statutory factors and closely question the opposing expert about them. ✦

Scott L. Mandel is a shareholder in the litigation department at Foster, Swift, Collins & Smith, P.C. His practice includes personal injury, commercial litigation, insurance and professional licensing matters.

FAST FACTS:

MCL 600.2955 assigns to Michigan trial courts the gatekeeper function established in *Daubert*.

The statutory criteria for admitting expert scientific testimony must be adhered to before that testimony can be admitted into evidence.

Footnotes

1. 509 US 579 (1993).
2. Unpublished Michigan Court of Appeals Docket No. 235567, decided 2-21-03.
3. 242 Mich App 221, 238; 618 NW2d 106 (2000), rev'd on other grounds, 465 Mich 885 (2001).
4. *Greathous*, 242 Mich App at 238 (ruling that the plaintiff could not seek to qualify an expert under this statute by attempting to introduce into evidence matters concerning the factors set forth by the statute because those matters were inadmissible under the rules of evidence).
5. No. 243017, decided 1-20-04.
6. Slip Op, p 2.

While appellate authority may not be entirely settled in this area, there has been a recognition that the federal standards for admissibility of scientific expert testimony set forth in *Daubert* have arrived in Michigan.