Expert Witness Exclusion – Lay Witness to the Rescue

by Maggie Tamburro on 2013/01/29

Think successfully excluding your opposing party's expert on a *Daubert* challenge equals a slam dunk on summary judgment and dismissal of the opposing party's case? Not so fast.

While many have concluded that prevailing on a *Daubert* challenge is the equivalent of summary judgment, a recent case demonstrates, as with most things in law, there's always an exception – in this case it came in the form of a lay witness.

The decision seems particularly relevant considering its timing and specifics – the case concerned property damage and a denied insurance claim for losses alleged to have occurred in connection with 2011's Hurricane Irene. Decided just December 24, 2012, the opinion was coincidentally issued in the wake of the devastating events following hurricane Sandy and the flurry of litigation that is almost sure to follow. The court which issued the decision? None other than that of the U.S. District Court for the Southern District of New York.

The case serves up a tangible reminder that, so far as expert testimony is concerned, a litigator can win the battle (prevail in excluding an adversary's expert) but lose the war (still fail to prevail on a motion for summary judgment), leaving the opposing party's case alive and well.

Could this happen to your case? The short answer: It depends.

This unusual combination of seemingly incongruent rulings demonstrates that when it comes to expert testimony, there's no such thing as a *Daubert* slam dunk, an automatic win, or a one-size-fits-all scenario.

Let's dig a little deeper into the facts in order to understand how and, more importantly, *why* such a seemingly inconsistent scenario occurred. After all, knowing the *why* makes for a much more powerful argument, whatever your position.

The Age-old Question: Wind or Water?

The case involved a dispute over insurance policy coverage in connection with losses and property damage allegedly sustained by plaintiff – a New York corporation which owned condominium property it claimed was damaged during Hurricane Irene.

Following defendant's investigation which determined that plaintiff's damage was caused exclusively by rain, (which was allegedly not a cause of loss covered under the terms of

plaintiff's policy, as opposed to wind, which was a covered cause of loss under the policy), defendant insurer denied plaintiff's claim.

Plaintiff then brought an action seeking indemnification for the claimed losses, seeking to show its damage was attributable to wind. In order to prove its case, plaintiff brought in a civil engineering expert and New York licensed professional engineer, with a highly credentialed background, who sought to testify that gusts of wind were the underlying cause of plaintiff's property damage. Defendant sought to exclude the testimony of plaintiff's expert under *Daubert* and FRE 702, and moved for summary judgment and dismissal of the complaint.

In its ruling on the two motions, the court did something surprising. It granted defendant insurer's motion to bar the testimony of plaintiff's sole expert, after determining the testimony was not reliable. However, the court still denied defendant's motion for summary judgment, concluding, that, even without the expert's testimony, the plaintiff had presented enough evidence to survive.

Court Excludes Plaintiff's Expert Witness under *Daubert*

With regard to the exclusion of plaintiff's expert witness pursuant to *Daubert* and FRE 702, the court agreed with the defendant insurer that the expert's testimony amounted to an "*ipse dixit* statement." The court determined that the proffered testimony failed to explain how the expert reached his conclusion that the claimed damage to plaintiff's property was attributable to gusts of wind.

In doing so, the court determined that the plaintiff's expert witness' testimony fell short of satisfying the reliability requirement of FRE 702 and lacked sufficient methodology and relevant data. Factors the court considered dispositive were that (1) the expert allegedly did not attempt to approximate the wind speeds necessary to cause the damage (which the court concluded rendered his testimony speculative), (2) the report was insufficient in methodology for differentiating wind damage from rain damage, and (3) the expert "did not examine the roof in person until … eight months after the damage allegedly occurred and after repairs had been completed…". Thus, the court barred the expert's testimony.

It's noteworthy that the court, in its discussion of the federal rules discussing expert testimony, made specific reference to FRE 403, which provides that relevant evidence may be excluded where the "probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading of the jury" and more. Here the court seemed to make a subtle point that it left hanging – it didn't expressly apply this rule to the case at hand. However, the court's inclusion of the rule in its discussion perhaps serves as both reminder and warning – expert testimony has the inherent potential to be both powerful and misleading. Therefore, in weighing possible prejudice against probative value under FRE 403, a judge has authority to exercise more control over expert witnesses than over lay witnesses.

Testimony of Lay Witnesses Saves the Day

In the absence of its expert witness' testimony, what rescued the plaintiff's case was perhaps not what you might expect. It amounted to the testimony of two lay witnesses – both of whom allegedly had personal knowledge of events either during or immediately

following the storm – and certain invoices the judge ruled as admissible evidence under the business records exception to the hearsay rule.

The lay witnesses included a contractor, who allegedly witnessed the property damage the morning after the storm, and the managing partner of the plaintiff's property, who testified he observed damage to the property during the storm.

Turning its attention to the contractor, the court took full opportunity to discuss FRE 701, the rule governing opinion testimony of lay witnesses. Rule 701 generally states that, if a witness is not testifying as an expert, the testimony is limited to testimony that is (1) rationally based on perception, is (2) helpful, and (3) is "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702."

Here, the defendant used FRE 702 as a sword rather than a shield, in an attempt to exclude the contractor's testimony as a lay witness. The defendant claimed that, since the contractor would testify to an opinion that was based on "scientific, technical, or other specialized knowledge," he was required to be properly qualified as an expert under FRE 702.

The court disagreed with the defendant insurer, and held that the contractor did *not* have to be qualified as an expert under FRE 702 to testify as to matters that were within his sphere of personal knowledge and perception of the events. The court found the contractor's testimony admissible under FRE 701 to the extent it relied on his first-hand knowledge, stating, "[I]t doesn't take an expert to see that roof flashing has peeled back, allowing water to penetrate a roof. Testimony to that effect is neither irrelevant nor prejudicial. Nor does [plaintiff's witness] experience as a contractor convert him from a lay witness to an expert witness."

Reading Between the Lines – Words of Wisdom from the Case

The court's ruling stands for a few propositions which are worth noting, some of which may tend to get lost in an effort to extrapolate bright line rules with regard to expert witness testimony.

1. Having an expert (even if the only expert in a case), excluded on a *Daubert* challenge doesn't automatically yield a win on motion for summary judgment. The court may look to other evidence, even that of lay witnesses, in determining whether there is a genuine issue as to a material fact, and whether any such evidence exists that could allow a reasonable jury opportunity to render a decision in the non-movant's favor.

2. A witness may not necessarily have to be qualified as an expert in order to testify about technical or specialized matters if he or she can otherwise testify under FRE 602 and FRE 701 as a lay witness. In the right kind of case, the court's discussion can be a useful one in (1) defending against arguments which attempt to preclude a witness based on the fact that he or she has not been properly qualified as an expert under FRE 702, and (2) arguing that a lay witness should be allowed to testify on a matter, even if technical, of which he or she has personal and first-hand knowledge regardless of whether he or she has been qualified as an expert.

3. In the post-*Daubert* world of trial judge as gatekeeper, the particular facts, circumstances, and degree to which expert testimony may be required to explain technical or specialized opinions are different for every case. The court honed in on the fact that, when addressing the admissibility of expert testimony under the federal rules, any inquiry must be a flexible one, (as is specifically dictated by the law). In addition, in weighing prejudicial verses probative value under FRE 403, courts will have more control over expert witnesses than lay witnesses, due to the difficulty in evaluating expert testimony and the court's duty to protect the jury from testimony that may be misleading or confusing.

Expert witnesses are still critical in a large number of cases, and often the extent to which an expert is needed will vary depending on the subject matter and nature of the case, the degree of technical or specialized experience that is required, the underlying claims, and a host of other facts and circumstances. What this case can tell us is that one should refrain from taking for granted the proposition that excluding an expert in certain cases means an automatic win at the summary judgment level, as hard and fast rules with regard to experts are often few and far between.

Although the court ruled that plaintiff had sufficient evidence, even without its expert, to survive summary judgment, is it enough for plaintiff to ultimately prevail at trial? Or, in a case such as this, is the court merely prolonging the inevitable? Tell us what you think in the comments section below.

The case is *405 Condo Associates LLC v. Greenwich Insurance Co.,* 11 Civ. 9662 (S.D.N.Y. Dec. 24, 2012).

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