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# 5th Circ. Says Daubert Gatekeeping Must Be On The Record

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Under Federal Rule of Evidence 702 and Daubert v. Merrell Dow Pharmaceuticals Inc., 509 U.S. 579 (1993), district courts serve as gatekeepers for the admission of expert testimony. District courts often have wide discretion in this realm, sometimes holding Daubert hearings, sometimes not. So how, in light of this discretion and faced with a cold record, can a court of appeals determine whether a district court adequately performed its gatekeeping duties?

In Carlson v. Bioremedi Therapeutic Systems Inc., the U.S. Court of Appeals for the Fifth Circuit held that district courts must conduct a Daubert inquiry on the record and provide reasons for the admission of expert testimony, though they need not conduct a formal Daubert hearing. In so holding, the Fifth Circuit joined the First, Seventh and Tenth Circuits in mandating that district courts perform on-the-record Daubert inquiries.

In Carlson, the plaintiff suffered from peripheral neuropathy, a diabetic condition that caused him to lose nerve sensation in his feet. He sought treatment with the ProNueroLight, a device that uses infrared light to heat up an area and thereby dilates blood vessels to allow more circulation. Within 48 hours, the plaintiff discovered ulcers on his heels that his podiatrist concluded were burn ulcers. The ulcers caused a bone infection that ultimately resulted in the amputation of one leg below the knee and the amputation of the heel of the plaintiff's other leg. The plaintiff brought a products-liability suit against the manufacturer and distributor of ProNeuroLight, alleging that the device caused his injuries.

At trial, the defendants' sole witness was the plaintiff's chiropractor, Dr. Lance Durrett, who testified about wound care, podiatry, neurology, diabetic medicine, the temperature necessary to cause a burn and the ProNeuroLight device itself. Durrett testified that the plaintiff's injuries looked like diabetic ulcers and stated that the ProNeuroLight was incapable of causing burns because, by design, it cannot raise surface temperatures by more than two degrees Fahrenheit.

The plaintiff filed a motion in limine to exclude Durrett's medical testimony, but the district court denied the motion without explanation. The plaintiff also objected twice during trial when Durrett began testifying about medical causation, but the objections were overruled. The jury returned a verdict for the defendants, and the plaintiff appealed on the sole ground that Durrett's expert testimony should not have been admitted. The Fifth Circuit reversed and

remanded because the district court failed to conduct an on-the-record Daubert inquiry.

The Fifth Circuit began by explaining that, although the defendants never formally designated Durrett as an expert, "it is the content of testimony, not a witness's formal designation as an expert witness, that determines whether Rule 702 applies."

The Fifth Circuit then turned to whether Durrett was qualified to give medical expert testimony. As recounted by the Fifth Circuit, Durrett has over three decades of experience as a practicing chiropractor and alternative medicine specialist and has used ProNeuroLight or similar devices for 14 years. Durrett, however, did not attend medical school and is not a medical doctor. While the Fifth Circuit acknowledged that nonmedical doctors can sometimes give medical testimony — for instance, "scientists with Ph.D.s [are] qualified to testify about fields of medicine ancillary to their field of research" — it expressed grave doubts about Durrett's qualifications to give expert medical testimony.

Rather than resolve the narrow and fact-bound question of Durrett's qualifications, the Fifth Circuit reversed on a different ground: the district court's failure to make an on-the-record Daubert determination. The Fifth Circuit reasoned that an essential component of a district court's gatekeeping function is giving its reasons on the record. Doing so assists the court of appeals in assessing whether an expert is qualified and has the relevant expertise to support his or her opinions. The Fifth Circuit also justified its holding by reference to previous rulings to that effect by the First, Seventh and Tenth Circuits. As the Fifth Circuit succinctly put it: "[a]t a minimum, a district court must create a record of its Daubert inquiry and articulate its basis for admitting expert testimony."

Two limitations to Carlson's holding are worth flagging. First, the Fifth Circuit stopped short of mandating formal Daubert hearings for the admission of expert testimony. District courts within the Fifth Circuit therefore still retain substantial discretion in how they conduct Daubert inquiries, even though they must now state their reasoning on the record. Second, the Fifth Circuit declined to decide what level of review applies when determining whether the district court actually performed its gatekeeping function in the first place. The Fifth Circuit hinted, however, that de novo review might be appropriate, since that standard is followed in the First, Seventh and Tenth Circuits. For now, however, the issue remains an open one — albeit one that may not have much practical importance, given the likelihood that district courts will simply make clear on the record their reasons for admitting or excluding expert testimony.

Carlson is an important decision because it creates procedural requirements for district courts to follow in any case involving expert testimony. Both parties must now be cognizant of the requirement in the Fifth Circuit that expert testimony must be accompanied by an on-the-record Daubert determination. Moreover, as Carlson itself recognizes, the Fifth Circuit is now the fourth federal court of appeals to require on-the-record Daubert inquiries, affording parties in other circuits with a powerful tool to deter district courts from admitting methodologically unsound expert testimony without explaining their reasoning. Thus, although the Fifth Circuit's decision benefited the plaintiff in that particular case, in the long run the rule adopted by the court (like Daubert itself) is likely to benefit business defendants, who are more often on the wrong end of unreliable expert testimony. In short, Carlson will ensure that, having been tasked with being gatekeepers of expert testimony, district courts actually stand by the gate.

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