

Beyond the Credentials of Opposing Experts

By Bradley K. Overcash and David E. Stovall



Bradley K. Overcash is an attorney with Wilkins Tipton, P.A., and is licensed to practice in Mississippi and North Carolina. Mr. Overcash received his B.A. from the University of North Carolina at Chapel Hill and graduated cum laude from the University of Mississippi School of Law. While at Ole Miss, he was the recipient of the Judge W.N. Ethridge, Jr. Memorial Scholarship.



David E. Stovall is an attorney with Wilkins Tipton, P.A., and is licensed to practice in Mississippi. Mr. Stovall received his B.A. from Mississippi State University, M.S. from the University of Southern Mississippi, and J.D. from Mississippi College School of Law.

Mr. Overcash and Mr. Stovall practice in the firm's Jackson office in the areas of litigation and insurance defense, commercial litigation and transactions, medical malpractice defense, premises liability, construction defense, and appellate practice. Wilkins Tipton, P.A. has offices in Jackson and Greenville, Mississippi, Nashville, Tennessee, and Mobile, Alabama.

"Tim was so learned, that he could name a horse in nine languages. So ignorant, that he bought a cow to ride on."

— Benjamin Franklin,
Poor Richard's Almanac

Introduction

An expert's credentials only tell part of the story. Often, opposing counsel will designate an expert with impressive qualifications as to education, training, and experience. These credentials do not automatically translate to legally acceptable opinions from the expert. Regardless of his or her qualifications, each opinion given must have a reasonably reliable basis. As the above quote suggests, education and experience are of no use if they are not properly applied.

Rule 702 of the Mississippi Rules of Evidence allows counsel to look beyond the face of the expert designation to not only challenge an expert, but to challenge the reliability and methods supporting the expert's opinions. The applicable rule, as amended in 2003, states as follows:

If scientific, technical or other specialized knowledge will assist the trier of the fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, 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.

MISS. R. EVID. 702. The Mississippi Supreme Court, in adopting Rule 702, requires the Court to act as the gatekeeper of all expert testimony. *Miss. Transp. Comm'n. v. McLemore*, 863 So. 2d 31, 36 (citing *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)). In addition, the Mississippi Supreme Court adopted the *Daubert* standard whereby expert testimony is excluded unless it has a "reliable foundation [that] is relevant to the particular case." *Id.* The Court continued, "[t]he trial court has considerable leeway in deciding in a particular case how to go about determining whether particular

expert evidence is reliable." *Id.* at 37 (internal citations omitted).

However, in order for the trial court to admit an expert's testimony, it must determine that "the reasoning or methodology underlying the testimony is scientifically valid" and that the "reasoning and methodology underlying can be applied to the facts in issue." *Id.* at 36. The designating party must demonstrate that the expert based his or her opinion on scientific methods and proper procedures, rather than mere speculation. *Webb v. Braswell*, 930 So. 2d 387 (Miss. 2006) (citing *McLemore*, 863 So. 2d at 36). Otherwise, an expert's opinion is not helpful to the trier of fact.

Battle of the Experts

When an expert is challenged, the designating party will often point to the expert's credentials and state that the case merely involves a "battle of the experts." This phrase refers to a scenario when two or more qualified experts weigh in on different sides of the issues. However, in order for a true battle of the experts to exist, all experts must first meet the credentials portion of Rule 702 and applicable case authority, and then each expert's opinion must be reliably supported and applied. If each expert's opinion has surpassed these hurdles, only then does a true battle of the experts exist. Otherwise, the testimony is inadmissible and should be excluded regardless of the purported status or credentials of the expert.

The Mississippi Supreme Court has recently provided guidance for approaching these challenges by examining the substance of the expert's opinion and limiting the applicability of the battle of the experts.

Recent Case Law

In *Hill v. Mills*, 26 So. 3d 322 (Miss. 2010), the Supreme Court expounds upon the Rule 702 framework for challenging the basis of an expert's

opinion. In *Hill*, the plaintiffs brought a wrongful death action following the death of their unborn child based on the alleged negligence of the plaintiff's treating physician in failing to order an ultrasound. *Id.* at 325. The plaintiffs retained Dr. Paul Fuselier as an expert in the field of obstetrics and gynecology to testify as to causation of the death their unborn child. *Id.* Pursuant to his deposition notice, Dr. Fuselier was instructed to bring all published and unpublished articles and literature supporting his opinions. *Id.* However, as the Court found, during his deposition Dr. Fuselier was unable to identify or produce any literature supporting his opinions. The Court stated:

When asked in deposition if he could provide any evidence-based scientific literature to support his opinion that bed rest was effective in preventing an early second trimester miscarriage, Dr. Fuselier testified, 'I don't have that information with me nor do I recall reading that.' When asked if he was aware of any support within the scientific community for his opinion concerning the value of tocolytics in extending pregnancy, Dr. Fuselier testified, 'I am not familiar with that literature at all.' . . . Near the end of his deposition, Dr. Fuselier was asked, 'Do you contend that any such evidence-based literature exists to support your statements?' He responded, 'I'm not aware today. I'm not sure that I couldn't find something.'

Id.

Following his deposition, the defendant filed a motion to exclude Dr. Fuselier's opinions on the basis that his opinions were not sufficiently reliable. *Id.* at 326. In support, the defendant offered the testimony of Dr. John Morrison. Dr. Morrison testified that Dr. Fuselier's opinions were not generally accepted in the scientific community and that his opinions lacked the supporting medical and scientific foundation required under the Mississippi Rules of Evidence. *Id.* In addition, Dr. Morrison provided peer reviewed literature which directly

contradicted Dr. Fuselier's opinions. Furthermore, the plaintiffs could not produce any literature regarding Dr. Fuselier's opinion as to the performance of an ultrasound. *Id.* at 327. The trial court granted the defendant's motion to exclude Dr. Fuselier, which was upheld by the Mississippi Supreme Court. *Id.*

In excluding Dr. Fuselier's opinion, the Mississippi Supreme Court held that expert testimony must have a reliable, scientific basis beyond "subjective or unsupported speculation." *Id.* at 329 (citing *Daubert*, 509 U.S. at 589-91). The Court stated:

[The defendant's] challenge to Dr. Fuselier's opinion . . . was not limited to Dr. Morrison's opposite opinion. [The defendant] (through Dr. Morrison) also claimed that the opinion was not reliable because it was not accepted in the scientific community. In support of this claim, Dr. Morrison submitted substantial medical literature, including authoritative medical journals and texts . . . which contradicted Dr. Fuselier's opinion. In response to this attack on the reliability of his opinion, Dr. Fuselier presented nothing.

Id. at 330. In its analysis, the Court focused on the support, or lack thereof, for the expert's opinion and did not classify the dispute as a battle of the experts. The defendant challenged the very basis and reliability of Dr. Fuselier's opinions through the use of Dr. Morrison's testimony and scientific literature. *Hill* is a clear example of a *Daubert* challenge as to the reliability of an expert's opinion, which is an issue of admissibility, and should be distinguished from a disagreement between two experts whose opinions are properly admissible under the Rules of Evidence.

In *Hill*, after the defendant challenged the reliability and methodology of Dr. Fuselier's opinions, the plaintiff chose to remain silent rather than confront these challenges head-on with reliable medical or scientific publications. *Id.* This silence and inability to confront these challenges ultimately resulted in exclusion of the purported testimony:

An expert whose opinions are under scrutiny may not ignore allegations of unreliability and nonacceptance within the scientific community, but rather must respond with some evidence that the opinions are, in fact, accepted within the scientific community.

Id. The Court found that it is of the utmost importance to test the basis of an expert's opinion, as the failure to do so would cause a return to "junk science" and would lead to the admission of testimony lacking "acceptance and support within the scientific community." *Id.* The Court concluded:

We restate for emphasis that, when the reliability of an expert's opinion is attacked with credible evidence that the opinion is not accepted within the scientific community, the proponent of the opinion under attack should provide at least a minimal defense supporting the reliability of the opinion. The proponent of the expert cannot sit on the sidelines and assume the trial court will ignore the un rebutted evidence and find the expert's opinion reliable. Were we automatically to allow introduction of expert opinions which are based upon nothing more than personal experience in cases where those opinions are contradicted in the scientific literature, we would effectively render Rule 702 and *Daubert* a nullity.

Id. at 332-33 (citing *Smith v. Clement*, 983 So. 2d 285, 290 (Miss. 2008)). The Mississippi Supreme Court applied similar reasoning in another case when it held that an expert's opinion was properly excluded when it was based only upon an inconclusive report and not upon sufficient evidence accepted within the scientific community. *Worthy v. McNair*, 37 So. 3d 609, 616 (Miss. 2010).

Although an expert may be sufficiently credentialed in that he or she is "qualified as an expert by knowledge, skill, experience, training, or education," the expert's opinion still must be reviewed

Continued on Page 13

Continued from Page 9

to ensure reliability. Specifically, there are three prongs as set forth in Rule 702 that must be met: (1) the opinion testimony must be “based upon sufficient facts or data,” (2) “the product of reliable principles and methods,” and (3) those principles and methods must be reliably applied to the facts of the case. MISS. R. EVID. 702.

If the basis for the opposing expert’s opinion is in question, an expert may be retained by the opposing party solely for the purpose of challenging that opinion and showing that the proposed opinion does not meet the three-prong test under Rule 702. Applying the above Benjamin Franklin quote: if an expert is academically sound, yet does not apply that knowledge properly, the testimony is of no use to the trier of fact and should be excluded. Just as Tim knows how to name a horse in multiple languages, it is of no use if he does not properly apply his education and purchases a cow to ride upon.

Gatekeeping Function Important as to Opinion Testimony

The importance of the court’s gatekeeping responsibility cannot be overstated, particularly in the case of jury trials. Jurors are likely to place a great deal of weight on the testimony of one whom the court has accepted and deemed as an “expert.” 91 MARQ. L. REV. 1119, 1132 (Summer 2008). The court’s gatekeeping responsibility must extend beyond a review of the expert’s credentials and into the area of the reliability and application of the opinion itself. The obvious problem with unreliable opinion testimony from a well-credentialed expert is that “the jury may be overly impressed by the credentials presented and terminology used by [the expert], hindering the jury’s ability to fully understand and evaluate the evidence presented by the expert.” *Id.* (internal citations omitted). In order to prevent this phenomenon from causing improper and unjust results at trial, the court must filter the expert opinion testimony in accordance with Rule 702, *Daubert*, *McLemore*, and their progeny.

It is not sufficient for courts to simply test the qualifications of a potential expert and allow testimony to flow to the jury that does not have a reasonably reliable basis in accordance with the Rules of Evidence.

Conclusion

As litigation pressures mount and the status of expert testimony grow in importance within complex cases, disparities continue to arise between expert credentials and expert opinions. Rule 702 and the case law interpreting it, particularly recent Mississippi case law, provides a framework to challenge the opinions of even the most highly qualified experts. Regardless of an expert’s education, training, and experience, his or her opinion testimony will be of no use to the trier of fact if that opinion is not reliably based. The opinion is similarly useless if it is derived using an improper method or improper application of that method. An expert’s credentials are immaterial if his or her opinion testimony is legally improper. ■