

# Vianello Forensic Consulting

## Experts Edition

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March 8, 2007

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### Testimony of Plaintiff's Engineering Expert Properly Admitted Under Daubert and Rule 702

### Fifth Circuit Finds No Manifest Error in Trial Court's Findings that Expert's Testimony was Both Reliable and Relevant in Trial of Product Liability Lawsuit—\$7.9 Million Verdict Reversed on Other Grounds

*Hodges v. Mack Trucks, Inc.*  
474 F. 3d 188 (C.A.5, Dec. 27, 2006)

A truck driver suffered extensive injuries, including paraplegia, after trying to avoid a collision with an oncoming car. The tractor-trailer was struck by the other vehicle, broke through a guard rail and slid down an embankment. The driver was ejected from the cab during the accident and received exacerbated injuries as a result. The driver and his wife filed a product liability suit against the manufacturer of the seatbelt and Mack Trucks, Inc. claiming a defective seatbelt allowed the driver to be ejected. The driver added an additional product liability claim for a door latch that failed during the accident.

Before trial, the manufacturer of the seatbelt settled the seatbelt claims for \$1.4 million. At trial the jury returned a verdict for the driver against Mack Trucks on the door latch claim for \$7.9 million in damages. Among other issues raised on appeal, Mack Trucks sought review of the trial court's admission of expert testimony.

Plaintiff's expert Steven Syson testified that the door latch failed, and that there was a safer alternative design which would have substantially

reduced the likelihood of the driver's injuries. The trial court denied a Daubert motion to exclude the expert's testimony.

Holding that the admission of expert testimony is reviewed on an abuse of discretion standard, the Fifth Circuit further stated that the trial court's decision would be upheld unless it was *manifestly erroneous*. Mack Trucks challenged Syson's testimony as unreliable under Fed. R. Evid 702 for the reasons that he was not a door latch specialist, he was previously found an unreliable expert witness by a Texas court in another case, he had not published any peer-reviewed articles on the Mack Trucks door latch, and he did not conduct his own tests or force calculations on the latches but relied on third-party testing.

On the other hand, the court noted that Syson had reviewed Mack Truck cab and door designs, he examined numerous patents for latches and door designs looking for safer designs, he directed an

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# Vianello Forensic Consulting

## Experts Edition

Page 2

March 8, 2007

engineering firm to conduct force tests on the Mack Truck latch, he analyzed FMVSS data published by the NHTSA to determine the relative strength of the Mack Trucks latch, and he calculated the deformation to the Mack Trucks door frame and its effect on the latch. Syson also conducted a risk-utility analysis on a safer alternative design and provided much more than speculation about the availability of the alternative latch. The court referred to Syson as an engineer “with many years experience working in, and testifying against, the automobile industry” who presented “very complex and technical testimony about the latch and how it failed”.

Noting that whether a proposed expert should be permitted to testify is case and fact specific, *Kumho Tire Co.*, 526 U.S. at 150-151, the court of appeals found no manifest effort in finding Syson’s testimony relevant and reliable.

In determining if testimony is *reliable* trial courts must assess if the reasoning underlying “the testimony is scientifically valid.” To determine if testimony is *relevant* it must ensure that expert testimony is of the “same level of intellectual rigor” in the courtroom as it is in the practice area of the expert. Rule 702 provides the standard that must be met to admit expert testimony. The testimony must be: (1) based upon sufficient facts or data, (2) the product of reliable principles and methods, and (3) the witness has applied the principles and methods to the facts of the case. The Fifth Circuit concurred with the trial court that these standards were satisfied in this case.

On other grounds, the verdict was reversed and the case remanded for a new trial. The trial court excluded evidence proffered by Mack Trucks about the use and failure of the seatbelt. Analyzing Texas law, the Fifth Circuit concluded that evidence should have been admitted. The Texas statutory prohibition against seatbelt use evidence to show contributory negligence did not apply to this secondary-collision product liability action where the evidence would rebut the essential element of causation.

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# Vianello Forensic Consulting

## Experts Edition

Page 3

March 8, 2007

### Testimony of Plaintiff's Expert Witness in Zicam Case Fails to Get Past Gatekeeper

#### Federal Judge Grants Summary Judgment on the Basis of Lack of Expert Testimony Regarding Causation After Excluding that Testimony

*Benkwith v. Matrixx Initiatives, Inc.*  
— *F.Supp.2d* —, 2006 WL 3804547  
(*M.D. Ala.*, Dec. 27, 2006)

In 2004, Maxine Benkwith filed a class action lawsuit against Matrixx Initiatives, Inc., Zicam, LLC, Botanical Laboratories, Inc., and McKesson Corporation, the designer, manufacturer, marketer, and distributor of Zicam No-Drip Liquid Nasal Gel, a homeopathic cold remedy. Zicam is intended to reduce the length and severity of colds by placing its active ingredient, zinc gluconate, in direct contact with the nasal epithelial membrane. Plaintiff alleged that the use of Zicam per its instructions caused her to lose her senses of smell and taste because a toxic quantity of its active ingredient came into contact with her olfactory epithelium.

The suit was filed in the Circuit Court of Montgomery County, Alabama, and removed to the U.S. District Court for the Middle District of Alabama. Defendants then moved to exclude the Expert Report and Testimony of Bruce W. Jafek, M.D., and for summary judgment on the basis of a lack of expert testimony regarding causation. Chief Judge Mark E. Fuller granted both motions.

The court divided its analysis into two primary areas: Whether Dr. Jafek's testimony should be excluded; and if so, should the court grant summary judgment to the defendants for lack of expert testimony regarding causation? Because plaintiff acknowledged that she must present expert evidence on causation, and Dr. Jafek's testimony

constituted that evidence, the second question turned purely upon resolution of the first.

Relying upon Fed. R. of Evid. 702 and United States v. Frazier, 387 F.3d 1244, 1260 (11<sup>th</sup> Cir.2004), the court laid out three considerations to be applied to expert testimony: (1) "the expert [must be] qualified to testify competently;" (2) "the methodology by which the expert reaches his conclusions [must be] sufficiently reliable;" (3) "the testimony [must assist] the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue." The court went on to assume *arguendo* that Dr. Jafek was qualified to render an opinion.

Dr. Jafek attempted to address whether a sufficient dose of Zicam, when used as directed, could reach the olfactory epithelium, by conducting experiments on cadavers. The results, Dr. Jafek claimed, showed that 140 micro-liters of Zicam reached the olfactory epithelium. The defense's expert, however, showed that because the nasal

### Expert Testimony CAUSATION and DAMAGES in COMMERCIAL LITIGATION

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# Vianello Forensic Consulting

## Experts Edition

Page 4

March 8, 2007

passages of cadavers are wider than those in living humans, the liquid had an easier path on cadavers. Additionally, the defense showed that glass panes used in the cadaver experiment conducted the liquid more efficiently than a living human's nasal mucosa. The court found that Dr. Jafek's study did not fit the facts of the case. The court also took issue with the fact that Dr. Jafek's study was undertaken after he had concluded and testified that Zicam could reach the olfactory epithelium.

To establish that zinc gluconate, Zicam's active ingredient, was toxic to the olfactory epithelium, Dr. Jafek relied on studies from the 1930's and 1940's which showed that a similar substance, zinc sulfate, was applicably toxic. Referencing the Eleventh Circuit's emphasis on careful scrutiny of the use of different, though similar, substances to establish causation, the court found that Dr. Jafek's observations did not establish a sufficient link between zinc gluconate and zinc sulfate to allow one to substitute for the other where causation was concerned.

The court concluded that Dr. Jafek's opinions did "not enjoy general acceptance in the relevant scientific community. Whether considered separately or in combination, the reasoning, authorities, and experiments upon which Dr. Jafek relies to support his opinion on general causation does not demonstrate the level of scientific rigor required by Rule 702." In short, Dr. Jafek's methodologies were not sufficiently reliable, nor were his experiments sufficiently analogous, to provide for the admission of his opinion.

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## Bankruptcy Debtor's Valuation Expert Fails to Satisfy Daubert Factors for Admissibility

### Even if Admissible, Expert's Testimony Entitled to No Weight

*In re Spectrum Golf, Inc.*  
350 B.R. 857 (Bkrcty.D.Ariz., 2006)

In this bankruptcy adversary proceeding, the reorganized Debtor called Damian J. Greco as an expert witness to value the interest of the Debtor's former CEO in a similar company named OpenTech Alliance, Inc. The former CEO challenged the qualifications of Mr. Greco and moved to strike his testimony.

In addition to giving due regard to Fed. R. Evid. 702, *Kumho Tire*, 526 U.S. 137, and *Daubert*, 509 U.S. 579, the court noted that Mr. Greco had a Masters in Business Administration, specializing in corporate finance and securities analysis. He testified to 35 years experience in valuing or appraising "1,000 to 2,000 businesses". He described his methodology as a "theoretical and practical approach" to valuing businesses.

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On the other hand, the court noted that Mr. Greco had no professional credentials to appraise businesses, was not a member of any appraisal societies, was not familiar with the Uniform Standards of Professional Appraisers, did not participate in any ongoing appraisal education programs, had never been qualified as an expert witness before, did not use any of the standard approaches to value in the valuation in question, and as CEO of the reorganized Debtor his impartiality could be questioned.

Bypassing the question of Mr. Greco's qualifications to testify as a valuation expert, the court noted that, under Daubert, the four factors which must be considered in deciding whether to allow an individual to testify as an expert in a scientific area are as follows: (1) whether the underlying method used by this individual may be or has been tested; (2) whether the method has been subject to peer review and publication; (3) the method's known or potential error rate; and (4) the level of the method's acceptance within relevant discipline.

Applying these factors, the court found a number of problems with Mr. Greco's testimony. After agreeing that Mr. Greco's testimony as an expert should be disregarded by the court, the court went on to state that even if it considered the testimony it deserved very little weight. Among other problems, Mr. Greco conceded that he had limited data upon which to rely for his sales forecasts. Also, he presented information which was not supported by any data. There was no analysis concerning the expenses in his report, and what those expenses may be if sales increased as dramatically as he predicted. Accordingly, the court concluded that Mr. Greco's testimony was basically entitled to no weight at all, and disregarded it.

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