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Ohio Association *of* Civil Trial Attorneys

A Quarterly Review of Emerging Trends in Ohio Case Law and Legislative Activity...

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President's Note

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MAY 2016

I really, really like lawyers: Whether they be my partners, opposing counsels, former partners, mentors, or just casual acquaintances we see at bar functions, or special events at law schools. And, of course, just hanging out with the endless supply of top talent to be found at any OACTA event. Truly, I cannot get enough of them or of you. I recently heard the lead federal prosecutor of the notorious New York mobster John Gotti speak at my law school. To my left a prominent criminal defense lawyer, at my right an equally prominent personal injury attorney, and we and our lovely spouses marveled in the stories of this former prosecutor, 21-year federal trial judge, and now, recently minted private practitioner, John Gleeson. What service he has done for his community! How wonderful to share the night with lawyers across all disciplines.

One can scarcely know the arc of one's career at its beginning, nor in today's world, the middle, let alone its twilight, with change everywhere, unrelenting. But sure as sun and rain, it promises to be a great ride. And not just because the fruits of hard work and determination will come, but also the colorful fellow-travelers we will meet, work with, and battle along the way. All these lawyers in all these varied specialties are doing what we're doing: Striving ever to improve, ever to win, to serve their clients, and to serve our society well.

As a loyal member of OACTA, whether newly joined or long in tenure, you know OACTA stands for *excellence* in our craft, and we will never stop trying to "win the race" for justice and fairness in our civil justice system. Yet, while in pursuit of our common goal of "getting better," we also acknowledge all the lawyers who strive for justice and fairness among the criminal defense bar, personal injury lawyers, judges, prosecutors, and corporate and in-house counsel. They too pour their hearts and minds into their craft, and hats off to them. In us, they shall always find our drive for excellence in our field.

This edition of the *Quarterly Review* is brought to you by our Product Liability substantive law committee, one of our most consistently active and vibrant committees. Tiffany S. Allison, Esq., provides the Product Liability Update with the most recent cases of interest in the field. This sets the stage quite nicely for the articles to come. Elizabeth Moyo, Esq., asks "When is Enough, Enough?" with her thorough treatment of Liability for Unidentified Risks and Unread Warnings. Joseph A. Gerlring, Esq., examines Ohio's Product Liability Statute of Repose, and Martha Allee, Esq., gives an excellent primer on how to apportion liability to non-parties under R.C. 2307.23. Susan Audey, Esq., and Christopher Pantoja, Esq., end the Review with a wonderful and comprehensive look at application of *Daubert* (and progeny) in Ohio State and Federal courts.

We are so very grateful to Chair, Mark F. McCarthy, and Vice-Chair, Johnathan R. Cooper, for their work both in guiding the Product Liability Committee of OACTA and for taking on the ambitious task of publishing an edition of the *Quarterly Review.* Please do enjoy this excellent collection of articles, heed all appropriate warnings at all times, and defend all your cases with a smile on your face.

Introduction

Product Liability Committee

Mark F. McCarthy, Chair
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The Product Liability Committee of the Ohio Association of Civil Trial Attorneys is privileged to bring you the OACTA Spring *Quarterly* dedicated to issues in the area of Ohio Product Liability Law.

Tiffany S. Allison has compiled cases from the Sixth Circuit Court of Appeals and other Ohio Courts dealing with recent relevant decisions involving expert testimony, the components part doctrine, and design defect and inadequate warnings.

Elizabeth Moyo, assisted by Darcy Jalandoni, authored an article on "Warnings" under Ohio law. Interestingly, warning is determined by a negligence standard; and, although an inadequate warning gives rise to a presumption of proximate cause, that presumption can be rebutted by demonstrating that an adequate warning would have had no impact on the outcome. This Article merits careful reading as it is an issue that arises in almost every product liability case.

Joe Gerling authored an article on the present status of Ohio's Statute of Repose, and, although the cases are sparse, the courts to date have generally found the Statute enforceable.

Martha Allee's timely article on apportioning liability to non-parties under Ohio Revised Code Section 2307.23 in product liability cases and asbestos claims should be reviewed. This area of the law is little understood and fraught with potential procedural pitfalls. The article merits a careful read as to when a defendant must seek apportionment.

Finally, Susan M. Audey and Chris Pantoja have updated an article concerning the application of the *Daubert* doctrine in Ohio. The article contains nine new cases over, and, apart from those that were dealt with in the 2013 Product Liability Issue of the OACTA *Quarterly* and lays out a clear path for prosecuting a successful *Daubert* challenge. Attacking the opposing expert's methodology, rather than his conclusion and ultimate opinion consistently provides the best chance for a successful result.

We hope that the scholarship herein provides you with an update on key areas of Ohio Product Liability Law and will be helpful in your day to day practice. We are looking to also provide updates in the OACTA Newsletter as to product liability topics on a periodic basis.

Product Liability Update

Tiffany S. Allison, Esq.
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Linert v. Ford,
20 N.E.3d 1047, 2014-Ohio-4431
(7th Dist.)
Jury Instructions, Exclusion of Evidence, Judge's Recusal

The plaintiff police officer was involved in a vehicle fire while operating a 2005 Ford Crown Victoria police vehicle. The defendant driver struck the rear of the plaintiff's vehicle at 100 m.p.h. which forced the subject vehicle's fuel sending unit to separate from the fuel tank, resulting in a fire. The plaintiff sued Ford under product liability and negligence. The defendant driver settled prior to trial. After a two week trial, the jury returned a verdict in favor of Ford and the plaintiff appealed eleven separate issues. We will discuss only a few of them.

The Seventh Appellate District held that it was error for the trial court to only instruct the jury on inadequate warnings at the time of marketing. The plaintiff argued that the trial court failed to properly instruct the jury that the vehicle could be defective due to inadequate post-marketing warning or instruction. It was the plaintiff's position that the jury should have been instructed on both the inadequate post-marketing warning and inadequate warnings at the time of marketing. The appellate court distinguished that a failure to warn claim involves a failure to warn of a risk, not a failure to warn of a defect and that a post-marketing failure to warn instruction was warranted regardless of the jury's finding on the manufacturing defect claim.

The Court of Appeals also found that the trial court abused its discretion in excluding evidence that a fire suppression system was available on vehicle models sold after the subject vehicle because the evidence was relevant and was directly related to elements of a failure to warn claim. During the trial, the plaintiff sought to introduce evidence that subsequent to the sale of the subject vehicle, Ford offered a fire suppression system on newer models of the vehicle. The plaintiff's intent was to show that the subject vehicle was defectively designed and failed to include the suppression system in addition to showing that Ford knew of the fire risk. The trial court excluded the evidence because the plaintiff did not provide expert testimony to show that had a fire suppression system been included on the subject vehicle, it would have prevented the fire and damages. However, the trial court failed to consider that the evidence offered to show that Ford had actual notice of a potential fire risk, which is an element in a failure to warn claim.

During trial, the parties learned that the trial judge drove a Mercury Grand Marquis, a vehicle with a similar fuel tank design as the subject vehicle. The plaintiff appealed arguing that the trial judge should have recused himself. The Seventh Appellate District determined that it was without authority to determine whether a trial judge was biased or should have recused himself. Rather, the Chief Justice of the Ohio Supreme Court has exclusive jurisdiction to determine a claim that a common pleas judge is biased or prejudiced. The court advised that if the plaintiff thought the trial judge should have recused himself, the remedy is to file an affidavit of disqualification with the Ohio Supreme Court clerk.

Ford appealed the Court of Appeals' decision related to the instruction regarding a manufacturer's post-market duty to warn and what facts trigger the duty. Amicus briefs were filed on the issue looking for clarification regarding a manufacturer's duty to warn consumers after a product has been sold or marketed. The Ohio Supreme Court heard oral arguments in January but has not yet ruled on the matter.

Zang v. Motorola,
34 N.E.3d 955, 2015-Ohio-2530 (1st Dist.)
Design Defect and Inadequate Warnings

This is a wrongful death action filed on behalf of a deceased firefighter against three defendants: the owners of the house where the fire occurred, Motorola and Morning Pride. One morning, the homeowners awoke to a fire in the basement of their home. The fire department was called

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and firefighters arrived on the scene. When the firefighter entered the home she failed to wear her personal protective hood manufactured by Morning Pride. A request for water was sent by the firefighters inside the home, but it was not received at the hydrant. The firefighter attempted to use her Motorola radio but received a busy signal. She then proceeded to call "mayday" three times. The fire conditions worsened and the firefighter was seen lying on the kitchen floor trying to use her radio. Her body was ultimately found in the basement after the kitchen floor collapsed due to the fire.

Summary judgment was granted for all defendants. The First Appellate District affirmed and reversed Motorola's summary judgment in part. Motorola's motion for summary judgment was based on the absence of design defects of the radio's system which utilized a trunk design, as opposed to a more traditional walkie-talkie system. The motion was granted on the ground that the plaintiffs failed to demonstrate that a feasible alternative design was available, as required under R.C. 2307.75(F). The other argument contained in Motorola's motion concerned the ergonomics of the radio's emergency button. The plaintiff's expert opined that the small size of the button, which was recessed, made it difficult to push with gloved hands. The trial court found that expert testimony was not required because it was within the knowledge and comprehension of a layman. The First Appellate District reversed this part of the motion finding several genuine issues of material fact remained: whether there were reasonably foreseeable risks associated with the design of the emergency button, whether the decedent had attempted to push the button, and whether she would have been rescued had the emergency button been activated.

The summary judgment motion filed by Morning Pride, the manufacturer of the personal protective clothing, was affirmed. The plaintiffs alleged defective design and failure to adequately warn claims. The facts demonstrated that the decedent failed to wear the issued protective hood when entering the home. Furthermore, the protective hood came with a user guide and contained a warning inside the hood.

Adkins v. Yamaha Motor Corp.,
17 N.E.3d 654, 2014-Ohio-3747 (4th Dist.)
Expert Testimony

The plaintiff, a passenger on a Yamaha Rhino, an off road recreational utility vehicle, was injured when it rolled over. The complaint asserted claims of negligent design and products liability. Yamaha moved for summary judgment on the basis that the plaintiff failed to provide expert testimony to support the defective product claim. The plaintiff argued that expert testimony was not required.

The Fourth District Court of Appeals' analyzed other similar cases where no expert testimony was necessary. For example, no expert testimony was required when a plaintiff sustained arm and hand injuries when pulled into an unguarded conveyor[1] system or when a plaintiff sustained injuries from a balloon malfunction[2]. Ultimately, the court upheld Yamaha's motion for summary judgment because the plaintiff failed to provide expert testimony reasoning that the product at issue resembled a motor vehicle which would require expert testimony as to its design.

Lee v. Smith & Wesson Corp.,
760 F.3d 523, (July 29, 2014, 6th Cir.)
Expert Testimony

The plaintiff sustained injuries to his eye, face and nose when, after firing the subject Smith & Wesson gun twice successfully, the gun improperly discharged. The plaintiff ultimately provided one set of accident facts which were different from the facts offered by his expert to make his opinions plausible. The trial court granted Smith & Wesson's motion *in limine* to exclude the plaintiff's expert based on the inconsistent fact patterns.

The Sixth Circuit reversed and remanded the decision. In federal practice, as well as in Ohio, even when an expert's theory contradicts the plaintiff's testimony, a party is not precluded from proving his case by any relevant evidence, even if it contradicts that of his own witness. Expert testimony is inadmissible when the facts upon which the expert bases his testimony contradict the physical evidence. In this case, if the jury was relying on the expert testimony the jury could have rejected parts of the plaintiff's story that aspects of the expert's testimony were mistaken.

According to the court, causation of the plaintiff's injury was the central factual issue in the case. As this was in dispute, the inconsistencies between the plaintiff's facts and the expert's facts of how the injury occurred should not have precluded the admissibility of the expert's opinion. Even analyzing the district court's ruling under an abuse of discretion standard, the district court's ruling excluding the plaintiff's expert was improper under Evidence Rule 702.

The dissenting opinion by Judge Keith argued that the trial court properly exercised its discretion in performing the gatekeeping functions under Federal Rule of Evidence 702 when it excluded the plaintiff expert's opinion on the basis that it did not "fit" the facts of the case and did not satisfy the relevance standard of Rule 702.

Rodrigues v. Baxter Healthcare Corp.,
567 Fed. App. 159 (6th Cir. 2014)
Expert Testimony

The plaintiff was administered allegedly contaminated heparin during cardiac surgery. He then suffered complications, including swelling and a drop in blood pressure, which he claimed were the result of the heparin, a drug intended to reduce blood clots, which had been recalled after a reported increase in adverse reactions. The plaintiff filed a products liability action against Baxter Corporation, the manufacturer of heparin, and the distributor in state court. The matter was removed to the Northern District of Ohio where it was consolidated into multi-district litigation.

The district court ruled that the plaintiff's expert only supported claims where the symptoms were apparent within sixty minutes after administration of the drug. Failing to support a causal link between contaminated heparin and complications that arose more than sixty minutes after administration, Baxter's motion for summary judgment was granted.

The plaintiff appealed and argued that the trial court erred in excluding the testimony of his expert who would have provided a cognizable theory of causation. The Sixth Circuit Court of Appeals affirmed the decision finding that the plaintiff's expert could "not explain the process by which the onset of symptoms could be delayed." The court determined that any testimony that the heparin could cause symptoms more than sixty minutes after administration would be speculative and unreliable. Simply put, the plaintiff expert's testimony failed to "connect the dots."

Zager v. Johnson Controls, Inc.,
18 N.E.3d 533, 2014-Ohio-3998 (12th Dist.)
Component Parts Doctrine

The plaintiff was a backseat passenger in a 1999 Chrysler 300 when the driver fell asleep and struck a construction barrier. As a result of the accident, a fifty pound cooler in the trunk struck the plaintiff's seat back ultimately leaving her a paraplegic. Suit was filed against Johnson Controls (JCI), the manufacturer of the rear seat, setting forth design defect and inadequate warning claims. The plaintiff claimed that the rear seat back failed to absorb the impact of the cooler. The trial court granted JCI's motion for summary judgment, which was affirmed by the Twelfth Appellate District.

The component parts doctrine applied because the subject product was the rear seat back. It was only after the subject product was integrated into the vehicle that it became allegedly defective. Under the component parts doctrine, the manufacturer of the component part is not liable for a defect in a completed product unless (1) the component itself is defective or dangerous or (2) the component manufacturer constructs or assembles the completed product or substantially participated in the design of the final product. The evidence demonstrated that JCI did not substantially participate in the design or assembly of the vehicle. There was no evidence that JCI was responsible for any safety related decisions or failed to meet any standards of Chrysler or the government at the time the subject product left JCI.

With respect to the inadequate warnings claim, a component part manufacturer's duty to warn does not extend to the speculative anticipation of how manufactured components can become potentially dangerous dependent upon their integration into a unit designed and assembled by another. The Twelfth Appellate District agreed that JCI did not have a duty to provide a warning to end users. It was not necessary to advise that the seat back would not provide cargo retention. The court also noted that JCI did not have any involvement in writing the vehicle's owner's manual.

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Endnotes

[1] Aldridge v. Reckart Equip. Co., 4th Dist. Gallia No. 04CA17, 2006-Ohio-4964

[2] Porter v. Gibson Greetings, Inc., 2nd Dist. Montgomery No. 16575 (Dec. 12, 1997)

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When is Enough, Enough? Liability for Unidentified Risks and Unread Warnings

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Someone can always identify an additional or "better" warning or instruction for a product—as evidenced by the many creative warnings advocated by plaintiffs in product liability lawsuits. The fact that a product could have additional risks and different warnings, however, does not make the existing warnings inadequate. Nor does an inadequate warning necessarily mean that it caused a plaintiff's injury. This article explores the standard for liability in a warnings defect case, as well as potential avenues of attack to defeat a warnings case under Ohio law.

Like other product defect cases, in a warnings case, a plaintiff must demonstrate that there is a defect—an inadequate warning or instruction—and that the defect caused plaintiff's injury. To prove a warning is inadequate, a plaintiff must demonstrate that the risk of injury was reasonably foreseeable and that a manufacturer exercising reasonable care would have warned of the risk.[1] Even if there is a question concerning the adequacy of the warning, however, a defendant may defeat a warnings claim by breaking the chain of causation between the alleged inadequate warning and plaintiff's injury. Plaintiff's failure to read a warning or instruction is not an absolute defense in all cases, but it creates a strong presumption in favor of defendants that the alleged inadequate warning was not the cause of plaintiff's injuries.

I. Inadequate Warning Standard

A product warning or instruction is not inadequate simply because the plaintiff was injured and, after the fact, devises a warning or instruction that allegedly would have prevented the injury. Under the Ohio Product Liability Act, R.C. 2307.71 *et seq.* ("OPLA"), a product is defective due to an inadquate warning or instruction only when both of the following criteria are satisfied:

> (1) The manufacturer knew or, in the exercise of reasonable care, should have known about a risk that is associated with the product and that allegedly caused harm for which the claimant seeks to recover compensatory damages; [and]
>
> (2) The manufacturer failed to provide the warning or instruction that a manufacturer exercising reasonable care would have provided concerning that risk, in light of the likelihood that the product would cause harm of the type for which the claimant seeks to recover compensatory damages and in light of the likely seriousness of that harm.[2]

In other words, an inadequate warning claim arises when "the manufacturer knew or should have known about a harmful risk associated with the product yet unreasonably failed to warn about that risk."[3]

Plaintiff cannot rely on general allegations that a warning is vague or inadequate. Plaintiff must identify a specific risk about which defendant should have provided a warning.[4] In addition, plaintiff must identify what warning would have been adequate to protect plaintiff from the foreseeable risk of harm.[5] Where plaintiff fails to introduce evidence of a specific risk or of an adequate warning or instruction to avoid that risk, judgment as a matter of law in favor of the manufacturer is appropriate.[6]

II. The Element of Proximate Cause and Related Presumptions

Even if the court determines that there is a genuine issue of fact concerning the adequacy of the warning, all is not lost—the plaintiff must prove that the inadequate warning actually caused her injury.[7] To demonstrate proximate

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cause in a failure to warn case, the plaintiff must show that (1) the lack of adequate warnings contributed to the plaintiff's use of the product and (2) the product constituted a proximate cause of the plaintiff's injury.[8] If plaintiff demonstrates that a warning is inadequate, a rebuttable presumption arises that the inadequate warning is the proximate cause of the plaintiff's injuries.[9] This presumption exists at the outset and accrues to the benefit of the plaintiff.[10]

Ohio also subscribes to the "Read and Heed" rule that if an adequate warning is given, a presumption arises that it will be read and followed.[11] In *Woeste v. Washington Platform Saloon and Restaurant*, for example, the First District Court of Appeals agreed with the trial court's finding that the warning at issue was adequate.[12] It then noted, in affirming the grant of summary judgment in favor of the defendant, that "[i]t is difficult to deem the warning inadequate when we are presented with evidence that the warning would have prevented [the plaintiff from incurring an injury]," had the plaintiff actually heeded the warning.[13] As multiple Ohio courts have recognized, "where a plaintiff fails to read and/or follow clear instructions and where the accident would not have happened had the plaintiff followed the instructions, the plaintiff's strict products liability and negligence claims will fail for lack of the requisite proximate cause."[14] Given the common practice of failing to read or follow warnings and instructions, defendants often have options as to how to break the causal chain in a failure to warn case.

a. Rebutting the Proximate Cause Presumption in Favor of Plaintiff

A defendant manufacturer rebuts the presumption in favor of the plaintiff by showing that an adequate warning would have made no difference under the circumstances.[15] The easiest way to do this is to show that the plaintiff simply failed to read the warning.

In *Mohney v. USA Hockey, Inc.*, for example, the plaintiff became a quadriplegic as a result of an injury suffered while playing hockey.[16] He brought a failure to warn claim, among others, against the manufacturer of his hockey helmet.[17] The plaintiff admitted during his deposition that the warning on the helmet was in plain view for him to read but that he did not read it, despite seeing it hundreds of times during the time he owned the helmet before getting hurt.[18] The District Court for the Northern District of Ohio, applying Ohio law, found that "[e]ven assuming arguendo that the warnings in this case . . . were inadequate, the presumption of proximate cause is rebutted, and a claim of a failure to warn fails where the evidence directly establishes that a plaintiff did not read the warnings."[19] The court granted summary judgment in favor of the defendant manufacturer.[20]

Similarly, in *Mitten v. Spartan Wholesalers, Inc.*, three employees were severely injured while manufacturing fireworks and claimed that the label warnings on the chemicals supplied were inadequate.[21] Noting that each injured employee testified that he did not read the warning labels, however, the appellate court found that the employees had failed to establish a causal connection between the inadequacy of the warnings and their injuries and affirmed summary judgment in favor of the defendant employer.[22] In Webb v. Smith, the court affirmed a directed verdict in favor of the defendant manufacturer where the plaintiff testified that he neither read nor relied upon the warning labels on the diving board at issue.[23]

In *Fulgenzi v. PLIVA, Inc.*, the U.S. District Court for the Northern District of Ohio concluded that the defendant manufacturer had effectively rebutted the presumption in favor of the plaintiff by showing that none of her doctors had read the labeling or warnings of the drug that allegedly caused her injury.[24] Under the learned intermediary doctrine, which is codified in R.C. 2307.76(C), "a drug manufacturer satisfies its duty to warn of known risks by providing an adequate warning to the medical professional of the risks associated with the drug's use."[25] The physicians in *PLIVA* testified that they reviewed neither the labeling of the brand name drug they prescribed due to their familiarity with the drug, nor the warnings on the generic drug the plaintiff actually ingested.[26] Thus, the manufacturer was entitled to summary judgment.[27] The court found that, under the circumstances, an adequate warning would have made no difference: "the inadequacy of a warning cannot be the proximate cause of a plaintiff's injuries if the user of the product failed to read the warnings accompanying the product. Even if such a warning were adequate, it could not prevent the harm if the user did not read the warning."[28]

Demonstrating that a plaintiff failed to read or pay attention to a warning, however, is not the only means of breaking the chain of causation between a warning and an injury: a defendant manufacturer need only show that an adequate warning would have made no difference under the circumstances. Defendants can show, for example, that the plaintiff would have ignored any warning provided, whether because she thought she already knew how to use the product or for some other reason. Although the court in *McConnell v. Cosco*, Inc. denied summary judgment in favor of the manufacturer, for example, it noted that a reasonable jury could conclude that the plaintiff's babysitter read the relevant warnings, but disregarded them because she thought she already knew how to use the product properly.[29]

In *Seley v. G.D. Searle & Co.*, the Supreme Court of Ohio found that an adequate warning for a prescription drug would have made no difference because the plaintiff did not effectively communicate her medical history to her prescribing physician.[30] Plaintiff Seley suffered a stroke rendering the left side of her body partially paralyzed after taking a contraceptive drug manufactured by defendant Searle.[31] Seley asserted that the warnings accompanying the contraceptive drug were defective because they failed to warn that women with a prior history of hypertension associated with pregnancy, known as toxemia, were subject to a higher risk of stroke as a result of taking the drug.[32] The Court, however, found that the plaintiff had failed to disclose her history of toxemia to her physician; therefore, even if the warnings had been in the form advocated by the plaintiff, her doctor could not have related those warnings to her case: "[w]here, as here, an adequate warning would have made no difference in the physician's decision as to whether to prescribe a drug or as to whether to monitor the patient thereafter, the presumption established by Comment j [of Section 402A of the Restatement (Second) of Torts] is rebutted, and the required element of proximate cause between the warning and the ingestion of the drug is lacking."[33] The Supreme Court consequently reversed the decision of the appeals court.[34]

b. Take Heed of Failing to Read

A word of caution to attorneys looking to challenge causation in a failure to warn case: although it seems self-explanatory that an injury cannot be caused by an allegedly inadequate warning that the plaintiff failed to read, this defense will not always be effective to rebut the presumption in favor of the plaintiff. Courts have found that if the display of warnings is inadequate, the failure to read the warnings does not always absolve the manufacturer of liability.[35] *Boyd v. Lincoln Electric Co.*, for example, involved a plaintiff, Boyd, who worked from 1977 until 1994, as a welder with products containing manganese. In 2004, he was diagnosed with mangansim, or manganese-induced parkinsonism.[37] Boyd filed suit against the manufacturers of the welding rods he used at work, seeking damages for injuries he alleged were incurred as a result of his occupational exposure to welding fumes and manganese.[38] The trial court granted summary judgment in favor of the defendants on Boyd's failure to warn claim, finding that he could not establish proximate cause because he had not actually seen or read the warnings.[39] The appeals court reversed, concluding that "it is not that Boyd chose not to *read* the warnings, but that he did not ever see the warnings due to the manufacturers' placement of the warnings on the containers of welding rods," which evidence suggested were usually not seen by welders.[40] Boyd had testified that, if he had been properly warned, he would have taken steps to protect himself against the risks of manganism.[41] In concluding that Boyd was entitled to have a jury decide whether the inadequacy of the manufacturers' warnings was the proximate cause of his injury, the court held that "a warning that is inadequate in manner, content, form, or communication can be the proximate cause of harm even if the user did not read the warning."[42]

In *McConnell*, the District Court for the Southern District of Ohio similarly denied summary judgment in favor of the manufacturer.[43] *McConnell* involved a child plaintiff who was tragically strangled after getting his neck stuck on his high chair's tray while at his babysitter's home.[44] He suffered brain damage as a result.[45] The plaintiffs claimed, among other things, that the manufacturer of the high chair failed to adequately warn of the risks of strangulation. The manufacturer moved for summary judgment arguing, in part, that the alleged inadequate warnings did not proximately cause the child's injury.[46] The court denied the motion, finding that a reasonable jury could conclude that the babysitter disregarded the warning

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because it inadequately warned of the risk of strangulation or that the warnings were not properly displayed.[47]

In other words, courts may find that a plaintiff's failure to read the relevant warning breaks the causal chain between a warning and an injury where the plaintiff *chose* not to read the warning—not where the inadequacy of the warning or its placement prevented the plaintiff from reading it or caused the plaintiff to ignore it.

III. Conclusion

As risks multiply, so do the warnings that will purportedly eliminate them; it is therefore difficult to determine in a vacuum when enough is enough for product warnings. Under Ohio law, however, the adequacy of warnings is determined by a negligence standard: whether the manufacturer knew or should have known of the risk of harm and yet ureasonably failed to warn of the risk. Not only is the standard one of reasonableness, an inadequate warning also does not necessarily result in liability. Although an inadequate warning gives rise to a presumption of proximate cause, that presumption is rebutted by demonstrating that an adequate warning would have had no impact on the outcome. Beware, however, of warnings that are inadequate because they are unreadable or difficult to access.

Endnotes

1 R.C. 2307.76(A).
2 *Id.*
3 *Lorenzo v. Bristol-Myers Squibb Co.,* Case No. 1:12 CV 00754, 2012 U.S. Dist. LEXIS 105518, at *11 (N.D. Ohio July 30, 2012) (citing R.C. 2307.76(A)).
4 *Id.; see also Zang v. Cones,* Case No. C-140274, 2015-Ohio-2530, ¶ 43, 34 N.E.3d 955 (1st Dist.) (affirming summary judgment in favor of manufacturer on warnings claim because plaintiffs offered no evidence to support their assertion that defendant's warnings were too vague).
5 *Huffman v. Electrolux Home Prods.,* 129 F. Supp. 3d 529, 541-42 (N.D. Ohio 2015).
6 *See, e.g., Lorenzo,* 2012 U.S. Dist. LEXIS 105518, at *12-13 (dismissing warnings claim because plaintiff's complaint failed to identify a specific risk of harm about which defendant should have warned); *Huffman,* 129 F. Supp. 3d, at 542-43 (awarding summary judgment to manufacturer on warnings claim in part because plaintiff's expert who did not prepare a proposed warning, read any literature on warnings, or demonstrate the effectiveness of the warning he had in mind, was excluded); *Zang,* 2015-Ohio-2530, ¶ 44 (affirming summary judgment in favor of manufacturer because plaintiffs failed to identify what was inadequate about the warning).
7 *Seley v. G.D. Searle & Co.,* 67 Ohio St. 2d 192, 200, 423 N.E. 2d 831 (1981).
8 *Id.*
9 *Id.*
10 *Id.*
11 *Id.*
12 163 Ohio App. 3d 70, 76 (1st Dist. 2005).
13 *Id.* at 75.
14 *Gumnitsky v. Delta Int'l Mach. Corp.,* 411 F. Supp. 2d 756, 768 (N.D. Ohio 2005)
15 *Seley,* 67 Ohio St. 2d at 201.
16 300 F. Supp.2d 556, 558 (N.D. Ohio 2004)
17 *Id.*
18 *Id.* at 579.
19 *Id.* at 578.
20 *Id.* at 580.
21 Case No. 13891, 1989 Ohio App. LEXIS 3162, at *1 (9th Dist.)
22 *Id.* at 4–5.
23 Case No. 18859, 1998 Ohio App. LEXIS 5482, at *15–16 (9th Dist.)
24 Case No. 5:09-cv-1767, 2015 U.S. Dist. LEXIS 144283, at *30 (N.D. Oct. 23, 2015).
25 *Id.* at *28.
26 *Id.* at *7–16.
27 *Id.* at *30.
28 *Id.* at 30–31.
29 *McConnell v. Cosco, Inc.,* 238 F. Supp.2d 970, 978–79 (S.D. Ohio 2003). *See supra* for further discussion of *McConnell.*
30 67 Ohio St. 2d at 201.
31 *Id.*
32 *Id.* at 201.
33 *Id.*
34 *Id.* at 203.
35 *Boyd v. Lincoln Elec. Co.,* 179 Ohio App. 3d 559, 571, 2008-Ohio-6143 (8th Dist. 2008); *see also McConnell,* 238 F. Supp.2d at 978–79.
36 *Boyd,* 179 Ohio App. 3d at 562–63.
37 *Id.*
38 *Id.*
39 *Id.* at 564.
40 *Id.* at 572–73.
41 *Id.* at 573.
42 *Id.* at 574.
43 238 F. Supp. 2d at 979.
44 *Id.* at 973.
45 *Id.*
46 *Id.* at 977.
47 *Id.* at 979.

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Ohio's Product Liability Statute of Repose

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The Ohio legislature has long attempted to enact statutes of repose in a number of areas.[1] The Ohio Supreme Court has explained the difference between a statute of repose and a statute of limitations:

> Unlike a true statute of limitations, which limits the time in which a plaintiff may bring suit *after* the cause of action accrues, a statute of repose***potentially bars a plaintiff's suit *before* the cause of action arises.

Sedar v. Knowlton Constr. Co. (1990), 49 Ohio St.3d at 195.

Because such a statute can prevent claims from ever accruing, even in those cases where there is a defect, an injury and no delay on the part of the plaintiff, the courts consider these statutes "strong medicine" and closely scrutinize them. *(McCann v. Hy-Vee, Inc.,* 663 F.3d 926 at 930 (7th Cir. 2011))

The statute of repose for product liability claims is contained in R.C. 2305.10, which also sets forth the two-year statute of limitations for claims involving bodily injury and damage to personal property. In pertinent part, R.C. 2305.10 provides:

*
*
*

> (C)(1) Except as otherwise provided in divisions (C)(2), (3), (4), (5), (6), and (7) of this section or in section 2305.19 of the Revised Code, no cause of action based on a product liability claim shall accrue against the manufacturer or supplier of a product later than ten years from the date that the product was delivered to its first purchaser or first lessee who was not engaged in a business in which the product was used as a component in the production, construction, creation, assembly, or rebuilding of another product.

*
*
*

> (G) This section shall be considered to be purely remedial in operation and shall be applied in a remedial manner in any civil action commenced on or after April 7, 2005, in which this section is relevant, regardless of when the cause of action accrued and notwithstanding any other section of the Revised Code or prior rule of law of this state, but shall not be construed to apply to any civil action pending prior April 7, 2005.

The exceptions to the application of the statute of repose involve instances in which there is a claim of fraud against the manufacturer or supplier, the claim involves an express written warranty for longer than a ten-year period, and for claims involving exposure to asbestos. Additionally, certain other exposure cases[2] are excluded from operation of the statute if the exposure occurs during the first ten years after the delivery of the chemical or product.[3]

In the overall tort reform package which included this statute, the general assembly stated in comments that the legislation was intended to recognize that manufacturers and suppliers have little control over products once they are delivered, and in particular do not have control over how the products are used and the conditions under which they are used. The legislature further stated that the persons who have control over the product are more appropriately responsible for that product, and that after ten years, the manufacturer or supplier will have difficulty finding witnesses and evidence to defend the design, manufacturing and marketing of the product. The legislature also felt that it is inappropriate to use current standards to judge products which were manufactured in earlier years. Finally, the legislature acknowledged that the statute of repose would allow Ohio manufacturers to be more competitive in the marketplace by reducing costs associated with civil litigation. (See editor's notes to R.C. 2305.10.)

In Ohio, statutes of repose have frequently been met with constitutional challenges. In *Sedar, supra,* the Ohio Supreme Court considered the constitutionality of the

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statute of repose contained in R.C. 2305.131, which applies to architects and builders. That court affirmed the application of the ten-year statute of repose contained in that statute, and upheld its constitutionality. Four years later, a differently constituted Ohio Supreme Court considered the constitutionality of the same statute, and found the statute unconstitutional, overruling *Sedar. (Brennaman v. R.M.I. Co.* (1994))

The Ohio Supreme Court considered the constitutionality of the current product liability statute of repose in *Grouch v. General Motors Corp., et al.,* 117 Ohio St. 3d 192 (2008). In finding the statute to be constitutional on its face, the court complimented the earlier reasoning of the court in *Sedar*, and sharply criticized the reasoning of the court in *Brennaman.* In Grouch, the plaintiff was injured 34 days before the expiration of the ten-year statute of repose. For this reason, the court held that the statute, while constitutional on its face, was unconstitutional as applied to the plaintiff in that case. Once the passage of time eliminated the situation which occurred in *Grouch,* very few courts have evaluated the statute of repose.

In one more recent case, the 8th District Court of Appeals considered a situation in which a plaintiff was injured using a lawnmower which had been manufactured and originally sold in 1994, was later traded in by the original purchaser, and was then resold in 2004 to the plaintiff's father, more than ten years after the sale to the original purchaser. Plaintiff argued that the statute of repose should not apply to the second seller of the mower, because the second seller should have incentive to remedy known safety defects. The court found that the second seller of the mower did not rebuild or recondition the mower, and merely preformed a routine tune-up to place the mower in working condition. Accordingly, the court held that the statute of repose applied to the second seller as a supplier and barred a suit against the seller even though the sale was shortly before the injury. The court suggested that the statute of repose might not shield the second seller from liability if the seller had made improvements to the product or had installed any defective components. (*Jones v. Walker Mfg. Co.,* 2012-Ohio-1546)

Given the small number of cases dealing with the statute of repose, it appears that plaintiffs are not typically challenging the application of the statute in usual product liability circumstances. The courts which have considered this statute have found it generally enforceable.

Endnotes

1 See R.C. 2305.131 (architects and builders), R.C. 2305.10 (products) and former R.C. 2305.11(B) (medical).

2 Toxic chemicals, ethical drugs, ethical medical devices, chromium, chemical defoliants and herbicides such as agent orange and non-steroidal synthetic estrogens.

3 R.C. 2305.10(C)(7)(a)(iii)

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Pointing the Finger: Issues in Appointing Liability to Non-Parties

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Revised Code Section 2307.23 provides the procedural mechanism of apportioning liability for purposes of determining joint and several liability and contributory fault of a plaintiff. Apportionment can serve as a valuable tool for defendants, particularly larger corporate defendants that may be a disproportionately large target at trial.

Pursuant to the definition of "tort action," R.C. 2307.23 applies to product liability and asbestos claims.[1] Ohio Jury Instructions' interrogatories for product liability claims include apportionment pursuant to R.C. 2307.23.[2]

R.C. 2307.23 provides as follows:

> (A) In determining the percentage of tortious conduct attributable to a party in a tort action under section 2307.22 or sections 2315.32 to 2315.36 of the Revised Code, the court in a nonjury action shall make findings of fact, and the jury in a jury action shall return a general verdict accompanied by answers to interrogatories, that shall specify all of the following:
>
> (1) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable to the plaintiff and to each party to the tort action from whom the plaintiff seeks recovery in this action;
>
> (2) The percentage of tortious conduct that proximately caused the injury or loss to person or property or the wrongful death that is attributable to each person from whom the plaintiff does not seek recovery in this action.
>
> (B) The sum of the percentages of tortious conduct as determined pursuant to division (A) of this section shall equal one hundred per cent.
>
> (C) For purposes of division (A)(2) of this section, it is an affirmative defense for each party to the tort action from whom the plaintiff seeks recovery in this action that a specific percentage of the tortious conduct that proximately caused the injury or loss to person or property or the wrongful death is attributable to one or more persons from whom the plaintiff does not seek recovery in this action. Any party to the tort action from whom the plaintiff seeks recovery in this action may raise an affirmative defense under this division at any time before the trial of the action.

Recent cases have raised two issues in applying R.C. 2307.23. First, can a defendant assign liability to *any* person from whom the plaintiff does not seek recovery? Second, when and how must a defendant seek apportionment to a non-party? While the answers may seem clear from the statutory language, plaintiffs and Ohio courts have pushed back.

To Whom May the Jury or Court Apportion Liability?

Significantly, R.C. 2307.23 provides that a defendant may seek apportionment of liability not only to any plaintiff or co-defendant, but also to non-parties.[3] Specifically, pursuant to R.C. 2307.011(J), a party may seek apportionment to the following:

(1) Persons who have entered into a settlement agreement with the plaintiff;
(2) Persons whom the plaintiff has dismissed from the tort action without prejudice;
(3) Persons whom the plaintiff has dismissed from the tort action with prejudice;

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(4) Persons who are not a party to the tort action whether or not that person was or could have been a party to the tort action if the name of the person has been disclosed prior to trial.[4]

Ohio courts have split regarding whether a defendant may apportion liability to a non-party that is immune from liability. The Fifth District and Eighth District reached opposite conclusions when asked whether defendants may apportion liability to a non-party employer that has workers compensation immunity.

In upholding apportionment to an immune employer in *Fisher v. Beazer East, Inc.*, the Eighth District noted that R.C. 2307.23 does not exclude any party who may be entitled to immunity (as an employer or otherwise).[5] Rather, under the express language of R.C. 2307.011(J), "'[p]ersons from whom the plaintiff does not seek recovery in this action'" includes '[p]ersons who are not a party to the tort action whether or not that person was or could have been a party.'"[6] Franklin County and Union County common pleas courts have agreed with the Eighth District.[7]

In *Wise v. Merry Moppet Early Learning Ctr.,* the Franklin County Court of Common Pleas applied Fisher to allow apportionment of liability to a minor plaintiff's parent despite.

In *Romig v. Baker Hi-Way, Inc.,* the Fifth District held that a jury should not be asked to apportion liability to a non-party employer since doing so would conflict with the immunity provided by the Workers' Compensation Act.[8] The Fifth District noted that R.C. 2307.23 does not exclude claims against employers but concluded that including an employer's negligence in the allocation of fault is inconsistent with the workers' compensation system as structured by the constitution and legislature.[9] The Fifth District went even further and suggested that evidence of the employer's negligence might be excluded.[10] In dissent, Judge Edwards noted that the majority's decision forced the defendant to pay its own fair share plus that of the employer.[11] In a 4-3 decision, the Ohio Supreme Court declined to accept *Romig* for review.[12]

The Supreme Court declined jurisdiction in *Romig* prior to the Eighth District's *Fisher* decision. *Fisher* is a more persuasive decision and common pleas courts outside the Fifth District have adopted its reasoning but there is still a risk in many Ohio courts that a defendant may not be allowed to apportion liability to a negligent but immune employer. Given the restriction of employer intentional torts in recent years, injured employees may increasingly seek recovery at trial from manufacturers and suppliers but not an employer, either because the employee did not bring an employer intentional tort claim or because the employer prevailed at summary judgment. Thus, this issue is ripe for a decision from the Ohio Supreme Court.

When Must a Defendant Seek Apportionment?

R.C. 2307.23(C) provides that attributing a percentage of liability to a non-party is an affirmative defense that any party may raise "at any time before the trial of the action."[13]

Despite the plain language of R.C. 2307.23(C), plaintiffs occasionally object to a defendant asserting an affirmative defense under that section after the defendant's initial answer. The safest course, of course, is to raise R.C. 2307.22 and R.C. 2307.23 as an affirmative defense in the answer.

In *Simpkins v. Grace Brethren Church of Delaware,* the defendant's answer asserted that "in the event that liability on the part of either of these Defendants is established ..., each Defendant is liable for only that portion of Plaintiff's damages caused by his or her own proportionate share of fault."[14] Two weeks before trial, the defendant filed a notice of intent to seek apportionment. The Fifth District held that the defendant had provided fair notice.[15]

Often, a plaintiff will settle his claims against individual defendants shortly before trial and dismiss them from the action. A co-defendant will thus become a non-party. In *Manchise v. Ionna,* where a plaintiff dismissed a defendant two days before trial, the First District held that the remaining defendant was not required to plead a comparative-fault defense in his answer because the subsequently dismissed co-defendant was a party at the time the answer was filed.[16] The co-defendant was not "[a person] from whom the plaintiff [did] not seek recovery[.]." The First District further concluded that the remaining defendant was not required to seek leave to file an amended answer to assert comparative-fault.[17]

Apportionment or Setoff of a Settlement Amount? One Additional Caveat.

When a co-defendant settles plaintiff's claims and becomes a non-party, remaining defendants may be entitled to a reduction in plaintiff's claim against them pursuant to R.C. 2307.28. However, R.C. 2307.29 states that R.C. 2307.28 does not apply to the extent that R.C. 2307.22 to 2307.24 make a defendant liable only for that defendant's proportionate share. Thus, if a defendant's liability is reduced by R.C. 2307.23, they are not entitled to setoff of a settlement amount. To date, Ohio courts have not analyzed the application of R.C. 2307.29. This section raises interesting issues of strategy for defendants.

Endnotes

[1] R.C. 2307.011
[2] OJI CV 451.23.
[3] R.C. 2307.23(A)(2), (C).
[4] R.C. 2307.011(G).
[5] *Fisher v. Beazer E., Inc.,* 8th Dist. Cuyahoga No. 99662, 2013-Ohio-5251, ¶ 37.
[6] *Id.*
[7] *Farley v. Complete Gen. Constr. Co.,* Franklin C.P. No. 12CVC-09-12394, 2014 Ohio Misc. LEXIS 9060 (Feb. 12, 2014); *Lu Swartz v. McCormick Equip. Co.,* Union C.P. Nos. 2011-CV-0020, 2011-CV-0546, 2013 Ohio Misc. LEXIS 7943 (July 15, 2013); *Wise v. Merry Moppet Early Learning Ctr.,* Franklin C.P. No. 13CVC-12349, 2015 Ohio Misc. LEXIS 8348 (July 24, 2015).
[8] *Romig v. Baker Hi-Way Express, Inc.,* 5th Dist. Tuscarawas No. 2011AP-02-0008, 2012-Ohio-321.
[9] *Id.* at ¶ 45-46.
[10] *Id.* at ¶ 55.
[11] *Id.* at ¶ 81.
[12] *Romig v. Baker Hi-Way Express, Inc.,* 132 Ohio St.3d 1409, 2012-Ohio-2454.
[13] R.C. 2307.23(C).
[14] *Simpkins v. Grace Brethren Church of Del.,* 2014-Ohio-3465, 16 N.E.3d 687, ¶ 52-55 (5th Dist.).
[15] *Id.*
[16] *Manchise v. Ionna,* 1st Dist. Hamilton No. C-120874, 2013-Ohio-3612, ¶ 14.
[17] *Id.*

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An Update of *Daubert* in Products Liability Cases in Ohio State and Federal Courts

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It has been over 20 years since the Supreme Court of the United States decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[1] Although then hailed as the slayer of junk science, it has taken time for courts and practitioners alike to come to grips with understanding the interplay between lofty scientific principles and the scientific method. But despite some junk science still slipping in, *Daubert* remains a powerful tool for excluding specious expert testimony in products liability actions in Ohio courts. This article will briefly discuss the analytical framework as it has evolved and then some of the notable *Daubert* decisions in the last few years in both Ohio and federal courts in the Sixth Circuit.

Analytical framework

The hallmark of the *Daubert* analysis is that it imposed a gate-keeping responsibility on federal courts to ensure that not only is an expert qualified to render an opinion, but that the opinion is both scientifically reliable and relevant to the issues before the court. Qualifications aside, reliability and relevancy are the most often scrutinized under this framework. In assessing reliability, the Court departed from the *Frye*[2] general acceptance test, and instead set out several factors for the district courts to consider, of which general acceptance is but one of those factors. They include the following: (1) whether the theory or technique has been tested; (2) whether it has been subjected to peer review; (3) whether there is a known or potential rate of error; and (4) whether the methodology has gained general acceptance.[3] Although this inquiry is a flexible one and now includes "technical" and "other specialized knowledge" in addition to "scientific knowledge," the focus is "solely on principles and methodology, not on the conclusions that they generate."[4]

Despite that focus, the *Supreme Court in General Electric v. Joiner,*[5] made clear that "conclusions and methodology are not entirely distinct from one another." It continued:

> Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.[6]

Stated differently, the expert's reasoning must [progress logically to be considered by the court as based on sound scientific methodology. This is not always an easy task, especially for the largely nonscientific legal community. It is all too easy to be impressed by a scientific expert's educational background, experience, and use of scientific terms and concepts that are often poorly understood. But as aptly said by Judge Posner, "a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist."[7] This distinction, although often difficult, is critical because "the courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it."[8] At bottom, the court's objective is to ensure that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field."[9]

The Supreme Court of Ohio adopted the *Daubert* factors in *Miller v. Bike Athletic Co.*[10] The *Miller* court emphasized,

however, that no one factor alone is a prerequisite to admissibility. There, Defendants argued that the expert's opinion was inadmissible because it had not been generally accepted in the scientific community nor had it been subject to peer review. The court found neither a barrier to admissibility. It rejected general acceptance under *Frye* outright.[11] And although "peer review may be helpful, it is not absolutely necessary for an opinion to be admissible."[12] This includes publication too. "'Publication (which is but one element of peer review) is not a *sine qua non* of admissibility; it does not necessarily correlate with reliability.'"[13] Instead, both general acceptance and peer review "are just factors for a court to consider in determining reliability."[14]

After *Miller*, the Supreme Court of Ohio appeared to continue a relaxed admissibility standard despite adopting the *Daubert* factors that were intended to impose gate-keeping obligations on the trial court.[15] It was not until the Court decided *Valentine v. Conrad,*[16] that it further refined the analytical framework. In *Valentine,* plaintiff offered the testimony of two experts who were prepared to testify that the decedent's occupational exposure to chemicals caused a rare form of brain cancer. Although both were well-qualified, the Court found that the trial court did not abuse its discretion in excluding their opinions because they "did not adequately explain" the scientific basis for their extrapolated opinions.[17] The epidemiological studies they relied on were too dissimilar to support general causation and no other studies on which they relied showed a causal link.[18] And although the Court approved an expert's use of differential diagnosis as a scientific method for proving causation, "its use is appropriate only when considering potential causes that are scientifically known."[19] Because neither expert could show that the chemicals the decedent was exposed to were capable of causing the decedent's brain cancer, their causation opinions were unreliable.[20] Contemporaneous events do not establish legal reliability.[21]

The Court again refined this analysis in *Terry v. Caputo.*[22] Adopting a two-step analysis for proving causation in toxic-substance cases, a plaintiff must establish "(1) that the toxin is capable of causing the medical condition or ailment (general causation), and (2) that the toxic substance in fact caused the claimant's medical condition (specific causation)."[23] And because general and specific causation are issues involving a "scientific inquiry," that proof must be by expert testimony.[24] In reaching this conclusion, the Court firmly entrenched the *Daubert* analysis for state trial courts by reaffirming the trial court's gatekeeper role, its consideration of the nondispositive reliability factors, and solidifying the relevancy or "fit" analysis.

Recent Ohio cases

In the last few years, intermediate appellate courts have applied *Miller, Valentine,* and *Caputo* in only a handful of products liability or toxic-substance cases. And even then, the focus has been primarily on the reliability prong of the *Daubert* analysis.

Expert's building-related-illness opinion excluded

Plaintiffs in *Finley v. First Realty Prop. Mgt., Ltd.*[25] were former tenants who sued building owners alleging they were injured by the accumulation of moisture and mold in their apartment. Plaintiffs' medical expert sought to testify that plaintiffs exhibited "a constellation of symptoms" consistent with "building-related illness."[26] The expert did not review Plaintiffs' medical records or contact their treating physician, nor did he examine Plaintiffs or conduct any testing.[27] Instead, he reached this conclusion by conducting a literature search, reviewing Plaintiffs' depositions, and conducting a telephone interview.[28] Importantly, the expert admitted that the "methodology" he employed with Plaintiffs "differed significantly" from the methodology he used for diagnosing building-related illness for patients in his private practice.[29] And even though the expert claimed to have employed differential diagnosis in reaching his conclusion, he admitted he did not rule out all potentially contributory causes, which he went on to identify.[30] In the end, the court found no scientific support for "building-related illness" and concluded that the expert reached his conclusion merely because of the temporal relationship between Plaintiffs' subjective complaints and the presence of mold in their apartment, which is contrary to *Valentine.*[31] The court found no abuse of discretion in excluding the expert's testimony and without it, summary judgment was appropriate under *Caputo.*[32]

Expert did not test carbon-monoxide-leakage theory

Plaintiff in *Marcus v. Rusk Heating & Cooling, Inc.*[33] developed a brain injury she claimed was caused by the release of carbon monoxide from an allegedly improperly

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installed and maintained furnace in her home. Plaintiff's expert was prepared to testify that the furnace released toxic levels of carbon monoxide based on a formula taken from the National Fire Protection Association's Standard 69 (NFPA 69) that was meant to measure carbon monoxide filtering through the furnace. But although the parties agreed that NFPA 69 is a generally accepted standard and the formula an accepted methodology, the expert conducted no tests, experiments, or measurements on the furnace (even though he said he could have) to determine the formula's value for flue leakage rate. Instead, he merely used a value from a 1961 Canadian study that was not part of the record before the court and whose reliability could not therefore be determined.[34] For another formula value (infiltration rate), he used a "wide range" of values that would "cover all the bases predictably anyway" instead of conducting a "tracer gas study" that he admitted would have given him that value.[35] The expert then speculated that the barometric damper of the furnace leaked carbon monoxide into the home merely by looking at photographs. He felt it was unnecessary to examine the actual damper, which by this time had disappeared, because he knew "what would be typically considered for leakage *** based upon his knowledge of systems.[36] Finding the expert's opinion unreliable because there was "too great an analytical gap between the expert's data and his opinions," the court excluded it and therefore granted summary judgment.[37]

Surprisingly, Plaintiff argued on appeal that Ohio had not adopted *Daubert* — an argument the court summarily rejected.[38] She then argued that the trial court imposed an "unachievable standard for reliability" by requiring an expert to satisfy all of the *Daubert* factors, which the court also rejected.[39] Instead, the court said that a trial court may consider "one or more factors" in its analysis,[40] which it did here when it found that the expert did no testing of his theory. Combined with the expert's reliance on a study whose reliability could not be assessed because it was not part of the record and the expert's reliance on unsupported assumptions, the trial court did not abuse its discretion in excluding the expert's testimony because there was no sound basis to conclude that carbon monoxide leaked from Plaintiff's furnace and entered her living space.[41] And because no other expert provided a specific-causation opinion, summary judgment was appropriate.[42]

No evidence that pest-control chemical causes hypothyroidism

In *Cooper v. BASF, Inc.,*[43] Plaintiff and her husband sued a chemical manufacturer claiming she developed hypothyroidism after being exposed to chemicals used in pest control. The trial court excluded the testimony of plaintiffs' general causation expert for several reasons. First, none of the studies relied upon by the expert showed a causal connection between the chemical and hypothyroidism. Second, the only study involving humans showed temporary symptoms that improved when no longer exposed to the chemical. Plaintiff's symptoms, in contrast, worsened after her alleged exposure. Third, the expert relied on animal studies, which were admittedly inappropriate models. Without any reliable scientific basis from which to extrapolate to reach a conclusion, the expert's general causation opinion was found unreliable and excluded.[44] Although the appellate court affirmed on largely the same grounds, it also noted that the expert never wrote any peer-reviewed articles on this subject despite his opinion that the chemical caused hypothyroidism, he did not different diagnosis or does reconstruction, he found no epidemiological study suggesting a causal link, and he did not blood work to confirm that she was exposed to the chemical.[45] Finding no abuse of discretion in excluding the expert's testimony, the court therefore found summary judgment appropriate and affirmed.[46]

Opinions supported solely by case reports held insufficient to withstand *Daubert* scrutiny

An Ohio trial court called into question Plaintiffs' experts' use of case reports in *Adams v. Proctor & Gamble Distrib., LLC.*[47] Plaintiffs sued the manufacturer of a consumer dental product alleging that the product caused neuropathy. Plaintiffs offered the testimony of three experts to support their theories of general and specific causation. To support their opinions, the experts relied on case reports which "merely suggest[ed] a possible association between" the product at issue and neuropathies; they did not establish actual causation.[48] The court was critical of the experts' failure to use any epidemiological data to support their opinions. Without such evidence, the experts failed to demonstrate the incidence of neuropathy in the general population in order to form a proper baseline.[49] The

experts also failed to properly establish the characteristics of the purported neuropathies, also called a case definition. Without a proper case definition, the court concluded, it would be uncertain whether all the subjects in the case reports actually had the disease of which Plaintiff complained.[50] For these reasons, the experts' opinions were deemed unreliable and inadmissible.[51]

Recent federal cases

Federal courts within the Sixth Circuit have been much more prolific than state courts in generating case law analyzing *Daubert* in products liability and toxic tort cases. Perhaps this is so because of the volume of products liability cases in the federal system, or perhaps not. Whatever the reason, you are likely to find that courts in the federal system have addressed a wider breadth of issues that are typically part of an expert's causation opinion.

Experts not qualified

Federal courts within the Sixth Circuit have been more willing to exclude experts on qualifications grounds than their state court counterparts. In *Rheinfrank v. Abbott Labs., Inc.,*[52] Plaintiff sued a prescription drug manufacturer, alleging that ingestion of Defendants' prescription pharmaceutical caused her infant daughter injuries. Defendants moved to exclude Plaintiff's warnings expert on qualifications grounds. Defendants argued that the expert, a board certified neurophysiologist, was not qualified to opine on whether the drug label should have included different warnings or on the adequacy of the manufacturer's regulatory submissions to FDA because those topics were beyond the scope of the expert's knowledge. Defendants did not dispute that the expert was a qualified neurologist. Instead, they argued that he lacked any specialized FDA product labeling knowledge and experience — a fact which was admitted during the expert's deposition — and, therefore, should not be permitted to opine on those issues. The district court concluded that the expert was not qualified to opine on the regulatory aspects of the product's label and excluded any such testimony from the expert as speculative.[53] The court, however, allowed the expert to opine on the science regarding the risks and benefits of the drug and to compare that knowledge with what was provided in the drug's label.[54]

In *Huffman v. Electrolux Home Prods., Inc.,*[55] Plaintiff's suit arose out of a front-loading washing machine that she claimed was defectively designed because the design caused mold to grown inside the machine. Plaintiff's proposed mechanical engineering expert had extensive experience in designing heating, air-conditioning, and refrigeration systems, but "minimal experience with washing machines and mold."[56] The court conceded that the expert was a well-qualified engineer, but excluded his testimony because of his lack of experience in the specific fields of washing machines and mold, explaining that "[e]xpertise in the technology of fruit is not sufficient when analyzing the science of apples."[57] Without the expert's testimony, Plaintiff could not support her claims and summary judgment was granted.

And in *Eiben v. Gorilla Ladder Co.,*[58] a mechanical engineer sought to testify about ladder design but had not shown in his Rule 26 report that he had "knowledge, skill, experience, training, or education" in ladder design to qualify as an expert in ladder design defect. Nothing indicated that he had ever published any opinions on ladder design or that he had ever served as an expert in ladder design-defect cases. Moreover, he never designed a ladder or drafted instructions or warnings for ladders, and had never conducted any studies or authored any articles on ladder slippage.

The takeaway from these cases is that while exclusion of an expert based on qualifications is relatively rare, when an expert has no knowledge on a topic, the subject of which forms the basis of her opinions, she should be excluded.

Experts' failure to present alternative designs and warnings renders opinions unreliable

Even though it had already excluded Plaintiff's expert on qualifications grounds, the district court in *Huffman* went on to discuss why it would have also excluded his opinions for failure to present an alternative design. The expert had proposed three modifications to the washing machine to help prevent mold build-up. He had not, however, tested to see whether the proposed modifications were feasible, whether and to what extent the modifications would compromise the benefits of front-loading washing machines, or whether they would completely eliminate

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mold growth in the washing machine.[59] As to warnings, the expert opined that Defendant should have affixed a placard to the washing machine warning consumers of the need to frequently disassemble and clean the machine. He did not, however, draft a proposed warning, read any literature on such warnings, or conduct any research on the efficacy of such a warning.[60] The court thus concluded that his methodology was unreliable and that his opinions were also inadmissible on this basis.[61]

Opinions supported by reports of non-experts are inadmissible

Plaintiff in Hutson v. Covidien Holding, Inc.[62] sued the manufacturer of a needle after the needle broke off in his gums during dental surgery. Plaintiff's sole expert was a clinical engineer who sought to opine that the needle was defectively manufactured. To support his opinions, the expert relied on the reports of two metallurgists, neither of whom Plaintiff had retained as an expert. The expert observed some of the tests conducted by the metallurgists, reviewed their reports, and concurred with their findings. The court concluded, however, that the tests—which involved inserting one of Defendant's needles into a mechanical pencil—were not sufficiently similar to injecting a needle into human gum tissue and were thus unreliable. Even if the metallurgists' testing were deemed reliable, Plaintiff's expert's opinions would have been inadmissible because "[a]n expert must make some [independent] findings and not merely regurgitate another expert's opinion."[63] Be wary, therefore, of an expert who conducts no independent testing and merely relies on the findings of others in rendering an opinion.

Expert excluded for assuming product defect

The district court in *S.S. v. Leatt Corp.*[64] excluded Plaintiff's consumer safety expert after concluding that her testimony would be unhelpful to the trier of fact. The expert proposed to offer various opinions on the warnings and advertising related to Defendant's neck brace. The expert admitted, however, that her opinions were "not based on any scientific knowledge regarding the existence of a product defect."[65] Instead, "she assumed a product defect solely on the basis" of the report of another of Plaintiff's experts.[66] The court thus concluded that the expert's opinions were inadmissible because they were not based on any scientific knowledge that would help the trier of fact in regard to determining the existence of a product defect.[67]

Case reports insufficient to support general causation

Federal courts also have been unwilling to allow expert opinions when supported only by case reports. In *DeGidio v. Centocor Ortho Biotech, Inc.,*[68] Defendant moved to exclude Plaintiff's general causation experts in a case involving a prescription pharmaceutical. The experts sought to support their opinions exclusively with case reports. After noting that the absence of epidemiologic data was not fatal to Plaintiff's case, the court nonetheless determined that the opinions were inadmissible based on the fundamental shortcomings of case reports.[69] The court noted that case reports: 1) fail to screen alternative causes for a patient's condition; 2) do not report the rate at which the alleged injury occurs in the general population for comparison purposes; 3) do not explain the mechanism of causation; and 4) typically omit relevant facts about the patient's condition.[70] In other words, case reports are just that—reports of adverse events that occurred in a particular patient or set of patients. They "do not provide an adequate scientific basis from which to conclude that [a given product] in fact cause[s] disease."[71] The court concluded that such a singular methodology was unreliable and excluded the experts' opinions.

Thus, when scrutinizing the opinions of an expert in a prescription medical product case, defense counsel should particularly be on the lookout for a lack of epidemiologic data and challenge opinions on that basis.

Opinions scrutinized more closely when rendered solely for litigation

Back in 2007, the Sixth Circuit identified an additional *Daubert* factor in *Johnson v. Manitowoc Boom Trucks, Inc.*[72] and began scrutinizing experts' opinions when the expert's opinion is prepared solely for litigation. Relying on the remanded *Daubert,*[73] the court explained:

> If it is clear that a proposed expert's testimony flows naturally from his own current or prior research (or fieldwork), then it may be appropriate for a trial judge to apply the *Daubert* factors in somewhat more lenient fashion. This would not

> mean that such an expert is to be accorded a presumption of reliability, but it would be in line with the notion that an expert who testifies based on research he has conducted independent of the litigation "provides important, objective proof that the research comports with the dictates of good science." *Daubert II,* 43 F.3d at 1317. However, if a proposed expert is a "quintessential expert for hire," then it seems well within the trial judge's discretion to apply the *Daubert* factors with greater rigor ***. Such an expert is not [to] be accorded a presumption of *unreliability,* but the party proffering the expert must show some objective proof *** supporting the reliability of the expert's testimony. *Daubert II,* 43 F.3d at 1317-18.[74]

The Sixth Circuit applied Johnson in *Lawrence v. Raymond Corp.*[75] in a products-liability action alleging defective forklift design. Plaintiff's expert admitted he conducted very little nonlitigation-related research and that his experience with forklift design is "almost all the result of his work as a consultant in forklift-accident cases." Examining the expert's testimony "more closely" because it was the result of the expert's litigation work in other cases, the district court ultimately found his testimony unreliable "because it had not been tested and was not at all accepted in the relevant scientific community." The court's conclusion that the expert was a "quintessential expert for hire" was not clearly erroneous.[76]

The point to remember her is that the expert's testimony is not excludible merely because it was rendered solely for litigation. The trial judge, however, has discretion to apply the *Daubert* factors "with greater rigor" when assessing reliability when it is.

Illogical or untested causation theory excluded as speculative

Perhaps one of the most clearly reasoned *Daubert* decisions is the Sixth Circuit's decision in *Tamraz v. Lincoln Elec. Co.*[77] There, plaintiff's expert was prepared to testify that plaintiff had manganese-induced parkinsonism. Restating the expert's reasoning in a step-by-step syllogism showed the flaws in the expert's reasoning that even the expert acknowledged required immediate "speculative jumps" to reach his conclusion. When trying to explain how he made these leaps, the expert responded "with tests he might do, not tests he had done."[78] These intermediate leaps aside, his ultimate conclusion that manganese *could* cause Parkinson's Disease does not show that it *did* cause it in this case. In fact, the court criticized Plaintiff for "conflat[ing] diagnosis with etiology," which had the effect of "eliding the distinction between [Plaintiff's] disease and what caused it."[79] The take-away from this part of the court's decision is to reduce the expert's reasoning to a syllogism to expose the flaws in that reasoning. An expert's conclusion is only logical if the major and minor premises supporting that conclusion are true.

Other notable take-aways from *Tamraz* include the court's discussion of different diagnosis. Acknowledging its usefulness in assessing reliability, employing "differential diagnosis" or "differential etiology" alone does not alone make the expert's causation opinion reliable. Instead, it raises three additional areas of inquiry: (1) Did the expert make an accurate diagnosis of the nature of the disease? (2) Did the expert reliably rule in the possible causes of it? (3) Did the expert reliably rule out the rejected causes? If the court answers 'no' to any of these questions, the court must exclude the ultimate conclusion reached.[80] The expert in *Tamraz* failed the last two prongs of this inquiry because "his efforts to 'rule in' manganese exposure as a possible cause or to 'rule out' other possible causes turned on speculation, not valid methodology." In the end, the court found the expert's causation analysis flawed, erroneously admitted and not harmless error, and reversed for a new trial.[81]

Other courts have shown that an expert's failure to test the theory of causation advanced made the expert's opinion nothing more than speculation. The district court in *Buck v. Ford Motor Co.,*[82] is an example. The court emphasized that "[v]alid scientific methodology usually involves 'generating hypotheses and testing them to see if they can be falsified."[83] Without testing, all the expert did was "identify a hypothesis."[84]

Although the court found the expert did not sufficiently test his hypothesis to warrant a finding of reliability, it did find some indicia that the expert's opinion should not be dismissed as junk science when it considered the peer-review/publication factor. As to this factor, the expert

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claimed that papers he presented at industry conferences constituted peer-reviewed work. Defendant disagreed and argued that peer review requires "formal submission and publication through an established journal."[85] The court rejected this argument but nonetheless found the expert's testimony unreliable and excluded it.

The lack of testing was also considered in *Dow v. Rheem Mfg. Co.*[86] There, Plaintiff was injured when a water heater exploded as he was trying to light the pilot. It was undisputed that the explosion was caused by a propane leak created when a rubber gasket became dislodged from the valve's safety magnet. What was disputed was how the gasket became dislodged. Plaintiffs' expert was prepared to testify that "adhesion" caused the dislodgment. A "key factor" of the expert's adhesion theory was that "the force of adhesion overcame the force of retraction" and caused the rubber gasket to dislodge. Yet the expert did nothing to test this part of his theory and, in fact, admitted that it was dependent on several unaccounted for factors. The failure to test this acknowledged "key factor" was fatal to the reliability of the expert's opinion and it was excluded. Without the expert's testimony, plaintiffs were unable to establish causation and summary judgment was appropriate.

The Sixth Circuit reached the same conclusion in *Lawrence v. Raymond Corp.*[87] There, the expert was prepared to testify that a forklift was defective because it did not include a latching door. But he only tested this alternative design once and then on a different type of forklift. Nor did this single, dissimilar test demonstrate that the alternative design had comparable benefits and risks. Agreeing that the expert's latching-door theory was insufficiently tested, the appellate court upheld the exclusion of the expert's testimony and affirmed the grant of summary judgment.

And in *Rodrigues v. Baxter Healthcare Corp.,*[88] Plaintiff sued a prescription drug manufacturer for complications allegedly related to a blood thinner. The expert sought to opine on the effects of the drug beyond the time period established by the FDA definition for the onset of symptoms. In support of this opinion, the expert relied on a study that contained no effects of the drug beyond a few minutes after administration.[89] When the expert could not explain the process by which the onset of symptoms could be delayed, the district court concluded that her proposed testimony was unreliable and inadmissible.[90]

Treating physicians' specific causation testimony excluded as unreliable

Plaintiff in *Sheffer v. Novartis Pharm. Corp.*[91] claimed that Defendant's prescription pharmaceutical caused her to develop jaw disease and sought to establish specific causation through the testimony of her treating physicians. Although the court acknowledged that a treating physician may generally opine on a patient's illness, its diagnosis, and its cause,[92] it concluded that any such testimony must still "have a reliable basis in the knowledge and experience of" the expert's discipline.[93] Defendant argued that the treating physicians' testimony should be excluded on that basis because none of them were experts in diagnosing jaw disease and none had expressed a definitive causation opinion. For instance, Plaintiff's treating oncologist admitted that he did not treat jaw disease and was not an expert in determining the cause of jaw disease.[94] Nor had he conducted a differential diagnosis to rule out other possible causes of his patient's injuries.[95] Plaintiff's dentist admitted that he was not an expert on jaw disease and merely speculated that Plaintiff's injuries could have been related to Defendant's product because Plaintiff had been treated with it—he conducted no tests and did not actually make a diagnosis.[96] Plaintiff's infectious disease specialist testified that he was "pretty certain" that he "relied on other people to diagnose" Plaintiff's jaw disease and what caused it.[97] And while Plaintiff's oral surgeon diagnosed and treated her for jaw disease, he admitted that he was not an expert in determining its cause.[98] Even though the surgeon relied on a pathology report which ruled out metastatic disease as a possible cause of Plaintiff's jaw disease, he did not rule out any other possible causes. The court thus refused to allow the treating physicians to opine on specific causation.[99] Thus, where a treating physician strays outside of the particular treatment rendered to Plaintiff and attempts to offer specific causation testimony, he must still adhere to the reliability tenets of *Daubert* or his opinions will be excluded.

Unrelated conclusory statements held inadmissible

The district court excluded another of Plaintiff's safety experts in *Leatt Corp.* because his conclusions were neither logically related to the issues raised by the case nor were they supported by any discernible methodology.[100] The expert sought to opine on how a "reasonably prudent" product manufacturer would apply a proper safety management system and then show how Defendant

failed to satisfy his proposed standards. The opinions, however, were offered without any specific analysis, with the expert merely pointing to "reports" of other riders who were also purportedly injured while wearing the same neck brace. Defendant argued that the expert's conclusions were irrelevant personal opinions and statements that were unsupported by a reliable methodology. The court agreed with Defendant and held the expert's testimony inadmissible.[101]

Certain "red flags" caution against admissibility

The Sixth Circuit in *Newell Rubbermaid, Inc. v. Raymond Corp.*[102] further informed the *Daubert* analysis by cautioning against admissibility when certain "red flags" are present. Recognized in *Best v. Lowe's Home Centers, Inc.,*[103] these red flags include an expert's reliance on anecdotal evidence, improper extrapolation, failure to consider other possible causes, lack of testing, and subjectivity. The expert in this subrogation action was prepared to testify that a forklift was defectively designed because it did not include a rear guard door. The expert's opinion, however, merely recounted information contained in accident reports involving other manufacturers' forklifts and reached a conclusion based on that information. He did nothing to verify this data or test his theory, and he never tested his alternative design or considered whether it was technically or economically feasible. These were all "red flags" that the district court identified in the expert's methodology and warranted the expert's exclusion.

Conclusion

The *Daubert* analysis remains a formidable force in determining the admissibility of expert testimony in products liability and toxic tort cases. By focusing on the reasoning employed and then exposing flaws in that reasoning, courts will be more likely to find the expert's testimony unreliable and inadmissible.

Endnotes

1 509 U.S. 579 (1993).
2 *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923)
3 *Daubert,* 509 U.S. at 593–594.
4 *Id.* at 594-95; *see also Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 141 (1999); Fed.R.Evid. 702(a).
5 522 U.S. 136 (1997).
6 *Id.* at 145.
7 *Rosen v. Ciba-Geigy Corp.,* 78 F.3d 316, 318 (7th Cir.1996).
8 *Id.* at 319.
9 *Kumho,* 526 U.S. at 152.
10 80 Ohio St.3d 607 (1998).
11 *Id.* at 613, n. 1.
12 *Id.* at 613.
13 *Id.,* quoting *Daubert,* 509 U.S. at 593.
14 *Miller,* 80 Ohio St.3d at 613.
15 *See State v. Nemeth,* 82 Ohio St.3d 202 (1998) (admitting expert testimony on battered child syndrome); *State v. Hartman,* 93 Ohio St.3d 274 (2001) (admitting expert testimony based on digitally enhanced fingerprint evidence); *State v. Adams,* 103 Ohio St.3d 508 (2004) (admitting expert testimony based on DNA evidence).
16 110 Ohio St.3d 42, 2006-Ohio-3561.
17 *Id.* at ¶¶ 21, 23.
18 *Id.* at ¶ 21.
19 *Id.* at ¶ 22.
20 *Id.*
21 *Id.* at ¶ 23.
22 115 Ohio St.3d 351, 2007-Ohio-5023.
23 *Id.* at ¶ 15.
24 *Id.* at ¶ 16.
25 185 Ohio App.3d 366, 2009-Ohio-6797 (9th Dist.).
26 *Id.* at ¶ 13.
27 *Id.* at ¶ 16, 17, 24.
28 *Id.* at ¶ 15.
29 *Id.* at ¶ 17, 19.
30 *Id.* at ¶ 23.
31 *Id.* at ¶ 24, 25.
32 *Id.* at ¶ 26, 29.
33 12th Dist. No. CA2012-03-026, 2013-Ohio-528, appeal not accepted, 2013-Ohio-2645 (No. 2013-0546, June 26, 2013).
34 *Id.* at ¶ 18, 21, 36.
35 *Id.* at ¶ 19, 32.
36 *Id.* at ¶ 20.
37 *Id.* at ¶ 6, 7.
38 *Id.* at ¶ 16, n. 3.
39 *Id.* at ¶ 33, 34.
40 *Id.* at ¶ 35.
41 *Id.* at ¶ 39.
42 *Id.* at ¶ 52, 53.
43 9th Dist. No. 26324, 2013-Ohio-2790.
44 *Id.* at ¶ 8.
45 *Id.* at ¶ 14.
46 *Id.* at ¶ 15, 19.
47 Hamilton County Common Pleas No. A1204223, 2014 WL 340129 (Jan. 22, 2014).
48 *Id.* at *4.
49 *Id.* at *3.
50 *Id.*
51 Id. at *9.
52 119 F. Supp. 3d 749 (S.D. Ohio 2015).
53 Id. at 773.
54 Id.
55 129 F. Supp. 3d 529 (N.D. Ohio 2015).
56 *Id.* at 533.
57 *Id.* at 537-540 (quoting *Buck,* 810 F. Supp. 2d at 842).
58 E.D. Mich. No. 11-CV-10298, 2013 WL 1721677 (Apr. 22, 2013).
59 129 F. Supp. 3d at 541.
60 *Id.* at 541-42.
61 *Id.*
62 S.D. Ohio No. 2:13-cv-895, 2015 WL 4040447 (June 30, 2015).
63 *Id.* at *4 (quoting *Buck,* 810 F. Supp. 2d 815, 844).
64 N.D. Ohio No. 1:12 CV 483, 2013 WL 3714142 (July 15, 2013).
65 *Id.* at *15.
66 *Id.*
67 *Id.*
68 3 F. Supp. 3d 674 (N.D. Ohio 2014).
69 *Id.* at 684-85.
70 *Id.* at 684.
71 *Id.* at 685 (quoting *Norris v. Baxter Healthcare Corp.,* 397 F.3d 878, 885-86 (10th Cir. 2005)).
72 484 F.3d 426, 434 (6th Cir. 2007).
73 *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311 (9th Cir. 1995).

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[74] *Johnson,* 484 F.3d at 435.
[75] 501 Fed.Appx. 515 (6th Cir. 2012).
[76] *Id.* at ¶ 518.
[77] 620 F.3d 665 (6th Cir.2010).
[78] *Id.* at ¶ 672.
[79] *Id.* at ¶ 673.
[80] *Id.* at ¶ 674.
[81] *See also Pluck v. BP Oil Pipeline Co.,* 640 F.3d 671 (6th Cir.2011) (citing *Tamraz* and excluding expert's testimony because he did not perform a reliable differential diagnosis).
[82] 810 F. Supp. 2d 815.
[83] *Id.* at ¶ 825, quoting *Daubert,* 509 U.S. at 593.
[84] *Buck,* 810 F. Supp. 2d at 825.
[85] *Id.* At 827.
[86] 6th Cir. Nos. 12-1742, 12-1757, 2013 WL 2397101 (June 4, 2013).
[87] 501 Fed.Appx. 515 (6th Cir. 2012).
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[92] *Id.* at *3.
[93] *Id.*, quoting Daubert, 509 U.S. at 592.
[94] *Id.* at *3.
[95] *Id.*
[96] *Id.* at *4.
[97] *Id.*
[98] *Id.*
[99] *Id.; see also Bowles v. Novartis Pharm. Corp.,* S.D. Ohio No. 3:12-cv-145, 2013 WL 5297257 (Sept. 19, 2013) (excluding specific causation testimony of Plaintiff's treating physicians on similar grounds).
[100] *Id.* at **15-19.
[101] *Id.*
[102] 676 F.3d 521 (6th Cir.2012).
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