

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

Susan Audey and Mark F. McCarthy

Tucker Ellis LLP



It has been 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 testimony, courts and practitioners alike have often frequently struggled to understand the interplay between lofty scientific principles and the scientific method. But even though junk science still makes its way into courtrooms across the state, *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 as well as some notable *Daubert* decisions in the



last few years in both Ohio state courts and federal courts within the Sixth Circuit.

Analytical framework

The hallmark of the *Daubert* analysis is that it imposed a gate-keeping responsibility on federal courts to ensure not only that an expert is 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 considering 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 encompasses “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 Gen. Elec. Co. v. Joiner*⁵ made clear that “conclusions and methodology are not entirely distinct from one another.” The Court explained:

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 stated 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 refined the analytical framework further. 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 upon were too dissimilar to support general causation and no other studies relied upon 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 refined this analysis further 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 state 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 the plaintiffs’ medical records or contact their treating physician, nor did he examine the plaintiffs or conduct any testing.²⁷ Instead, he reached this conclusion by conducting a literature search, reviewing the plaintiffs’ depositions, and conducting a telephone interview.²⁸ Importantly, the expert admitted that the “methodology” he employed with the 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 the 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 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

CONTINUED

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 thereafter granted summary judgment.³⁷

Surprisingly, the 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 the 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. The 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 bases 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 no differential diagnosis or dose reconstruction, he found no epidemiological study suggesting a causal link, and he did no 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 thereafter found summary judgment appropriate and affirmed.⁴⁶

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

Although challenges to an expert’s qualifications are often difficult, they are occasionally successful. In *Eiben v. Gorilla Ladder Co.*,⁴⁷ for example, 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 district court in *Franklin v. Enterprise Rent-A-Car Co. of Cincinnati and Kentucky*,⁴⁸ likewise excluded a proposed expert on qualifications grounds. There, plaintiffs’ engineering expert sought to testify that an automobile was defectively designed because the seatbelt did not work properly and the airbag did not deploy. Finding plaintiffs’ expert had no training or education in

automotive design and was never employed in the field of automobile mechanics, vehicle manufacture, or automotive engineering, the court found him unqualified to offer opinions about airbag design or safety-restraint design.

The court in *Faulkner v. ABB Inc.*⁴⁹ excluded the design-defect opinions of an industrial-hygiene expert attempting to testify that an “analyzer shelter”—a shelter housing various instruments to evaluate gas samples—was defectively designed. Although the witness had extensive education and expertise in workplace safety, he lacked any experience with analyzer shelters, nitrogen-backed instrument air delivery systems, or industry standards for nitrogen back-up systems. In fact, he testified that he “would have to talk to some individuals” who had experience in these systems. *Cf. Peak v. Kubota Tractor Corp.*⁵⁰

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.*⁵¹ and began scrutinizing experts’ opinions when the expert’s opinion is prepared solely for litigation. Relying on the remanded *Daubert*,⁵² 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 a 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 1317-18.⁵³

The Sixth Circuit recently applied *Johnson* in *Lawrence v. Raymond Corp.*⁵⁴ in a products-liability action alleging defective forklift design. The 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.⁵⁵

The point to remember here 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.*⁵⁶ 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 intermediate “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.”⁵⁷ 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 the plaintiff for “conflat[ing] diagnosis with etiology,” which had the effect of “eliding the distinction between [the plaintiff’s] disease and what caused it.”⁵⁸ 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 differential 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?”

CONTINUED

(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.”⁵⁹ 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.⁶⁰

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.*,⁶¹ 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.’”⁶² Without testing, all the expert did was “identify a hypothesis.”⁶³

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 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.”⁶⁴ 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.*⁶⁵ There, the 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 it was dependent upon 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.*⁶⁶ 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.

In *Siegel v. Dynamic Cooking Sys., Inc.*,⁶⁷ the challenged expert tested his theory on an exemplar of the product, but under dissimilar conditions. The plaintiff had been injured in an oven explosion. The experts agreed that a gas leak originated in the oven’s regulator and that this gas leak caused the explosion. They differed, however, as to whether the leak was caused by a defectively manufactured regulator or a defectively designed oven. The expert for the regulator manufacturer was prepared to testify that the regulator leaked because the oven’s design “exposed the regulator to heat that exceeded the regulator’s maximum operating temperature.” He tested this theory on an exemplar of the oven, but one with greater historical use than that of the plaintiff’s and then using natural gas instead of propane gas used in the plaintiff’s oven. Although the expert then had the exemplar converted to propane gas and resumed testing, the testing involved temperatures beyond the regulator’s design parameters. The expert also tested a newer model exemplar as well, which differed in design from the plaintiff’s oven. Despite the differences between the exemplars tested and the plaintiff’s oven, the expert nonetheless thought it was “reasonable to conclude” that “temperature degradation” contributed to the gas leak. The district court concluded that the expert’s opinion “contains not just one speculation but a string of them” and excluded the expert’s testimony because the testing was unreliable. The appellate court agreed.

Speculation was also at work in *Eiben v. Gorilla Ladder Co.*⁶⁸ There, the plaintiff was injured in a ladder accident and alleged that defendants failed to warn that the ladder could “slide-out” from under the user. Plaintiff’s expert was prepared to testify that the ladder feet wore out too quickly, which allowed for the possibility of slide-outs when the ladder is positioned on dry, grit-covered asphalt. He hypothesized that the grit particles on asphalt create a lower coefficient of friction on the surface, that ladder feet cannot overcome the lower coefficient after becoming

worn, and, therefore, caused the ladder to slide out. The expert did not test his grit-particle theory. Instead, he inspected the ladder's feet and looked at photographs of a recreated accident scene on some unspecified date where he saw "grit-type particles." He concluded that because the ladder slid out, "the only plausible explanation" was that the friction coefficient was low. Although the court, relying on *Clark v. Chrysler Corp.*⁶⁹ noted that the Sixth Circuit "has deemphasized the importance of performing tests in every situation," the expert here did no testing to reinforce his conclusion and instead merely looked at the ladder and its feet, and inspected the accident scene years after the accident. And even though the lack of testing alone is not dispositive, the expert's opinion was premised on unsupported assumptions and failed to satisfy the remaining *Daubert* factors, making it unreliable and inadmissible.

Certain "red flags" caution against admissibility

The Sixth Circuit in *Newell Rubbermaid, Inc. v. Raymond Corp.*⁷⁰ further informed the *Daubert* analysis by cautioning against admissibility when certain "red flags" are present. Recognized in *Best v. Lowe's Home Centers, Inc.*,⁷¹ 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., Ltd. 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 on digitally enhanced fingerprint evidence); *State v. Adams*, 103 Ohio St.3d 508 (2004) (admitting expert testimony 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 ¶ 11, 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 E.D.Mich. No. 11-CV-10298, 2013 WL 1721677 (Apr. 22, 2013).
- ⁴⁸ W.D. Ky. No. 4:10CV-00072-JHM, 2013 WL 820858 (Mar. 5, 2013).
- ⁴⁹ W.D. Ky. No. 5:08-CV-212, 2012 WL 443757 (Feb. 10, 2012).
- ⁵⁰ E.D.Mich. No. 09-13762, 2013 WL 593823 (Feb. 15, 2013) (refusing to exclude opinions of mechanical engineer as to design of front loader even though expert had no experience with agricultural equipment)
- ⁵¹ 484 F.3d 426, 434 (6th Cir. 2007).
- ⁵² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311 (9th Cir.1995).
- ⁵³ *Johnson*, 484 F.3d at 435.
- ⁵⁴ 501 Fed.Appx. 515 (6th Cir.2012).
- ⁵⁵ *Id.* at 518.
- ⁵⁶ 620 F.3d 665 (6th Cir.2010).
- ⁵⁷ *Id.* at 672.
- ⁵⁸ *Id.* at 673.
- ⁵⁹ *Id.* at 674.
- ⁶⁰ 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).

CONTINUED

⁶¹ 810 F. Supp. 2d 815.

⁶² *Id.* at 825, quoting *Daubert*, 509 U.S. at 593.

⁶³ *Buck*, 810 F. Supp. 2d at 825.

⁶⁴ *Id.* at 827.

⁶⁵ 6th Cir. Nos. 12-1742, 12-1757, 2013 WL 2397101 (June 4, 2013).

⁶⁶ 501 Fed.Appx. 515 (6th Cir.2012).

⁶⁷ 501 Fed.Appx. 397 (6th Cir.2012).

⁶⁸ E.D.Mich. No. 11-CV-10298, 2013 WL 1721677 (Apr. 22, 2013).

⁶⁹ 310 F.3d 461, 467 (6th Cir.2002).

⁷⁰ 676 F.3d 521 (6th Cir.2012).

⁷¹ 563 F.3d 171 (6th Cir.2009).

Susan Audey is counsel in the Cleveland office of Tucker Ellis LLP. She is a member of the firm's Appellate and Legal Issues practice group and is certified by the Ohio State Bar Association as an appellate specialist. She also teaches brief writing as an adjunct instructor at Cleveland Marshall College of Law and is a frequent speaker on appellate and legal writing issues.

Mark F. McCarthy is a partner in the Cleveland office of Tucker Ellis LLP. He is a trial lawyer and works mainly in the areas of products liability, commercial, and intentional tort defense litigation. He currently serves as National Coordinating Counsel for several industrial equipment manufacturers in defense of their product liability cases throughout the United States and is responsible for structuring and overseeing their risk management programs. He has been an adjunct professor of Trial Advocacy at Case Western Reserve University School of Law for more than two decades. He is a founder, secretary, and general counsel of St. Martin de Porres High School, an inner city college preparatory school located in Cleveland, Ohio.