

**10TH CIRCUIT PERMITS EXPERT TO TESTIFY OVER DAUBERT OBJECTION**

In *Jerry Newman v. State Farm* (Aug. 5, 2008), 10th Circuit Court of Appeals No. 07-6060, <http://www.ck10.uscourts.gov/opinions/07/07-6060.pdf> involved an appeal by insured's claiming the district court erred in failing to exclude State Farm's expert testimony under Daubert. The case involved a house fire that State Farm denied first party coverage for. Suit was filed alleging breach of the insurance contract and bad faith. State Farm denied the claim alleging the insured's had motive and opportunity to set the fire and fraud and false swearing.

Plaintiffs argued that the district court abused its discretion in overruling their motion to exclude the testimony of State Farm's expert witnesses, as irrelevant and professionally and scientifically unreliable.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case. Under Daubert (and the Federal Rules of Evidence), expert evidence must be both reliable and relevant. When assessing reliability, courts consider "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . that reasoning or methodology properly can be applied to the facts in issue." *Daubert v. Merrell Dow Pharm, et al* (1993) 509 U.S. 579, 592-593.

Neither Rule 702 nor Daubert "require a finding that an expert's proffered testimony reach absolute certainty with regard to the likely truth of a conclusion." "Instead, the plaintiff must show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which satisfy Rule 702's reliability requirements." *Dodge v. Cotter* (10th Cir. 2003) 328 F.3d 1212, 1222. Accordingly, a trial court's focus generally should not be upon the precise conclusions reached by the expert, but on the methodology employed in reaching those conclusions. But "an expert's conclusions are not immune from scrutiny: 'A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.'" *Dodge*, 328 F.3d at 1222. As long as an expert stays within the reasonable confines of his subject area, our case law establishes a lack of specialization does not affect the admissibility of the expert opinion, but only its weight.

In assessing whether an expert's testimony is relevant, courts look at the logical relationship between the evidence proffered and the material issue that evidence is supposed to support to determine if it advances the purpose of aiding the trier of fact. "Relevant evidence" is defined as that which has 'any tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Daubert*, 509 U.S. at 587.

First, the plaintiffs contend the expert testimony was irrelevant because it did not assist the jury in understanding the evidence or in determining any fact at issue. See Fed. R. Evid. 702. According to the plaintiffs, State Farm relied on the evidence concerning their motive and opportunity to start the fire and the rumor of arson, not on the tests and opinions of the experts when it denied insurance coverage. This maybe true, but the Court of Appeals agreed with the district court's conclusion that the expert evidence was relevant at trial. Both expert's testimony related to the incendiary nature of the fire, the issue before the jury.

Second, the Plaintiffs contend that the expert testimony and evidence was unreliable. They fault one expert (1) for reaching a conclusion that the stove burner was on and then conducting tests to support that conclusion; (2) for having no expertise to conduct metallurgical tests; and (3) for conducting tests that were not similar to the circumstances surrounding the house fire. Because the second expert based his opinion on the opinion of the first expert, plaintiffs contended that other expert's opinion was also unreliable. Recognizing it was a close question, the district court decided that State Farm "barely" made a sufficient showing of reliability and that the issues concerning the experts' opinions go to weight rather than to admissibility. The Court of Appeals agreed.

The first expert conducted two experiments to support his belief that the stove burner was on at the time of the fire. In the first experiment, he placed a skillet on an electric burner and left the burner on until it reached maximum temperature. In his second experiment, he placed a skillet on a burner that was not turned on and put the burner and skillet in a kiln until the kiln reached maximum temperature. The experiments were conducted at a lesser temperature and for a lesser amount of time than the fire, as there was no practical way to actually recreate the fire.

But as the plaintiffs point out, he never placed a skillet on a burner, turned the burner on, and then put the two in the kiln. Further, as the plaintiffs contended, there was no significant difference in the results of the two tests, because both ended up with a burner imprint on the bottom of the skillet, just like the skillet in the fire, even though the branding on the skillet that had been on the skillet in the kiln was less visible. Thus, they maintain the results of the testing do not establish the burner was on at the time of the fire. Additionally, the plaintiffs appropriately fault the expert for using new skillets when conducting his tests and for not nesting one skillet inside of another for the tests. Lastly, they note he did not express an opinion as to the fire's cause.

Despite these criticisms, the Court of Appeals concluded that the district court did not abuse its discretion in concluding that his testimony was sufficiently reliable, so that the jury should decide what weight to give to the evidence. Although he was not a metallurgist, he did consult with one. And it was his opinion that the fire was incendiary. The plaintiffs vigorously cross-examined the expert and presented their own expert witness disputing the incendiary nature of the fire. See *Daubert*, 509 U.S. at 596 ("Vigorous cross-examination, presentation of

*Continued on page 9*

contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.”). Additionally, the jury instructions advised the jury to give the experts’ testimony the weight the jury believed to be proper.

With respect to the other expert, the plaintiffs contended his testimony that the fire had an incendiary origin was unreliable because it was based on the other experts “unreliable investigation.” Because the Court of Appeals concluded that the district court did not abuse its discretion in allowing the first expert’s testimony, the Court of Appeals also concluded the district court did not abuse its discretion in allowing his testimony. The plaintiffs also faulted the second expert for claiming there were signs of excessive heat. The plaintiffs provided an expert contradicting this testimony. Thus, it was for the jury to decide which expert to believe.

The judgment of the District Court was affirmed.

## COLO. CT APPEALS HOLDS WILLFUL AND WANTON CONDUCT MAY OVERCOME FIRE ALARM LIMITATION OF LIABILITY CONTRACT PROVISION

In *U.S. Fire v. Sonitrol, et al*, Case No. 07CA0060 (July 24, 2008), available through LEXIS at 2008 Colo.App. LEXIS 1172, Division Two of the Court of Appeals of Colorado reviewed a case concerning a contract for burglar and fire alarm services, two groups of plaintiffs who had filed separate actions appeal two orders for summary judgment issued in favor of the alarm company, Sonitrol Management Corporation (Sonitrol).

Plaintiffs in the first case, United States Fire Insurance Co., Commonwealth Insurance Co., Lexington Insurance Co., United Insurance Co., United Fire & Casualty, Tartan Products Co., and Western Innovations, Inc. (Insurers), and the plaintiffs in the second case, Core-Mark Midcontinent, Inc. and Core-Mark International, Inc. (Core-Mark).

### A. Course of Dealing Between Core-Mark and Sonitrol

Core-Mark distributes merchandise to convenience stores. It leased approximately 90,000 square feet of a 120,000 square foot warehouse for storing inventory. The Insurers insured the warehouse and inventory.

Sonitrol markets security and fire alarm services, and in 1995 contracted with Core-Mark to install and monitor an alarm system to protect the warehouse.

Pertinent provisions of the contract are as follows:

### 12. LIMITATIONS OF DAMAGES:

A. It is understood and agreed by the parties hereto that DEALER [Sonitrol] is not an insurer and that insurance, if any, covering personal [\*3] injury and property loss or damage on CLIENT’S premises shall be obtained by CLIENT [Core-Mark], at CLIENT’S sole expense; that the payments provided for herein are based solely on the value of the service as set forth herein and are unrelated to this value of CLIENT’S property or the property of others located on CLIENT’S premises;

...  
C. CLIENT UNDERSTANDS AND AGREES THAT IF DEALER SHOULD BE FOUND LIABLE FOR ANY LOSS OR DAMAGE DUE FROM A FAILURE TO PERFORM ANY OF ITS OBLIGATIONS OR A FAILURE OF THE EQUIPMENT TO PROPERLY OPERATE, DEALER’S LIABILITY SHALL BE LIMITED TO A SUM EQUAL TO THE TOTAL OF ONE-HALF YEAR’S MONITORING PAYMENTS, OR FIVE HUNDRED DOLLARS (\$ 500) WHICHEVER IS THE LESSER, AND THIS LIABILITY SHALL BE EXCLUSIVE AND SHALL APPLY IF LOSS OR DAMAGE, IRRESPECTIVE OF CAUSE OR ORIGIN, RESULTS DIRECTLY OR INDIRECTLY TO PERSONS OR PROPERTY FROM PERFORMANCE OR NON-PERFORMANCE OF ANY OF DEALER’S OBLIGATIONS OR FROM NEGLIGENCE, ACTIVE OR OTHERWISE, OF DEALER, ITS EMPLOYEES OR AGENTS.

Sonitrol’s services included remote monitoring of microphones that could detect sounds made by intrusions into the warehouse. These microphones, or audio detectors, would send an audio activation signal when they detected a sound exceeding a minimum volume, and record and store five seconds of the audio. The alarm system would also make an automated telephone call to a central monitoring facility. The operators monitoring the console in that facility were instructed to replay the five seconds of stored audio recording and listen to live audio transmission for at least forty-five seconds. If the operator heard a burglary in progress, he or she would dispatch the local police. However, if the operator determined the activation was a false alarm, the operator could reset the alarm. Resetting the alarm erased the stored audio and terminated the telephone connection to the monitored premises.

In December 2002, a burglar entered Core-Mark’s warehouse while it was closed over the weekend. He returned a little later with two confederates, and the three looted the warehouse for approximately three hours. They made no effort to be quiet, but shouted to each other, threw boxes around, and used a noisy gravity chute lined with steel rollers to move boxes. When they were ready to leave, one of the burglars smashed boxes of flammable liquids, pulled down large jugs of methanol, and set two fires at 8:42 a.m. The fire department arrived on the scene eleven minutes later at 8:53 a.m., alerted by a passerby, but it was too late to save the property.

During this episode, Sonitrol’s off-site monitoring center received audio activations caused by the noise the burglars created. Two different Sonitrol employees received the alarms and reacted as follows: (1) audio activation at 1:35 a.m., no replay of stored audio, alarm reset in 36 seconds, no call to police; (2) audio activation at 6:50 a.m., no replay of stored audio, alarm reset in 4 seconds, no call to police; (3) audio activation at 7:29 a.m., no replay of stored audio, alarm reset in 40 seconds, no call to police; (4) audio activation at 7:56 a.m., no replay of stored audio, alarm reset in 1 minute and 49 seconds, no call to police;

Continued on page 11

(5) audio activation at 8:36 a.m., no replay of stored audio, alarm reset in 2 minutes and 10 seconds, no call to police; (6) audio activation at 8:44 a.m., operator replayed stored audio, no call to police; (7) 8:46 a.m. (four minutes after fire started), the telephone connection between warehouse and monitoring center was severed. At 9:05, the Sonitrol employee called the fire department, which [\*6] had been at the scene for twelve minutes.

Despite the fire department's efforts, the fire burned for a week and destroyed the building and all the inventory, resulting in a loss of approximately \$ 20 million.

Core-Mark and the Insurers filed separate lawsuits against Sonitrol. As pertinent to this appeal, they asserted claims for (1) negligence, (2) gross negligence, and (3) breach of contract. These lawsuits were consolidated with a number of others related to the warehouse fire.

The district court granted Sonitrol's motion to dismiss Core-Mark's claims for negligence and gross negligence. Sonitrol moved for summary judgment against both Core-Mark and the Insurers, which was granted.

In granting summary judgment on Core-Mark's claims, the district court concluded the limitation of damages clause in the contract was enforceable. Although the district court acknowledged Core-Mark's argument with respect to willful and wanton conduct, it did not address that argument.

In granting summary judgment on the Insurers' claims, the district court concluded as to the limitation of liability clause was enforceable as to the Insurers as well as Core-Mark.

Core-Mark and the Insurers appeal only the orders granting summary judgment.

Core-Mark and the Insurers contend the district court erred in holding that the limitation of liability clause in the contract with Sonitrol was enforceable, because the issue of whether Sonitrol acted willfully and wantonly should have been decided

by the fact finder. The Court of Appeals agreed.

Sonitrol argues that the limitation of liability clause in the contract is not an exculpatory clause but a liquidated damages clause, and therefore the analysis for willful and wanton conduct does not apply. Accordingly, Sonitrol contended the limitation of liability clause was enforceable regardless of its own conduct. The court disagreed.

Exculpatory clauses insulating a party from its own negligence, though disfavored, are permitted in Colorado if one party is not at a significant disadvantage in bargaining. However, an exculpatory clause is against public policy if it enforces a release from willful and wanton conduct.

In the present case, the court considered whether this public policy exception for willful and wanton conduct that applies to an exculpatory clause also applies to a limitation of liability clause. Although this issue has not previously been addressed in Colorado, the court concluded that the general rule applies to both exculpatory and limitation of liability clauses

Sonitrol argued that a limitation of liability clause in a burglar alarm contract is in reality a liquidated damages clause and therefore, Sonitrol argued, the willful and wanton exception should not apply.

A liquidated damages clause may be treated as an exculpatory clause, when it denies liability for all but a nominal amount of damages.

The court did not decide here whether the clause in question is a limitation of liability clause, a liquidated damages clause, or an exculpatory clause, because the general rule applies to all of them. The court held that if the effect of such a clause is to insulate a party from its own negligence, it does not shield against a claim for willful and wanton conduct.

Sonitrol's argument that the damage limitation in its policy is not a nominal sum was not relevant to the holding that clauses insulating a party from liability for its own willful and wanton conduct are against public policy.

Therefore, although the district court properly found that the limitation of liability clause shielded Sonitrol from claims for simple negligence, because Core-Mark and the Insurers properly

raised the issue of willful and wanton conduct supported by evidence, the district court should not have granted summary judgment before determining the issue of willful and wanton conduct.

Core-Mark and the Insurers contend they have presented ample evidence of a triable issue of fact as to whether Sonitrol's failure to notify emergency services was willful and wanton. Sonitrol contends that, as a matter of law, plaintiffs' allegations amount to simple negligence. Because all inferences from the evidence must be drawn in favor of the nonmoving party, we agree with Core-Mark and the Insurers that a triable issue of fact exists.

"Willful and wanton conduct is purposeful conduct committed recklessly that exhibits an intent consciously to disregard the safety of others. Such conduct extends beyond mere unreasonableness." "Willful and wanton conduct or willful and reckless disregard" means: conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.

The trier of fact determines whether there has been negligence. Ordinarily, determining whether a defendant's conduct is willful and wanton is a question of fact.

Here, multiple audio activations were received by two different operators over a period of several hours. The operators reset the alarms without listening to recorded audio or live audio, or calling police. On deposition, one operator could offer no explanation of her conduct, and appeared to have little memory of what happened. Had the operators listened, they could have heard the intruders shouting sending boxes along steel rollers, and dropping and smashing merchandise. Even after the last telephone connection was severed by fire, nineteen minutes elapsed before the operator called the fire department.

A jury could conclude this was purposeful conduct committed recklessly with conscious disregard for the rights and safety of others. The court noted that although the claim for gross negligence was dismissed with respect to Core-Mark, the claim for breach of contract alleged "willful and wanton disregard

Continued on page 13

for the safety of persons and property at the Core-Mark Warehouse.” Thus, Core-Mark properly pleaded willful and wanton conduct.

Giving Core-Mark and the Insurers the benefit of all favorable inferences as we must, the Court of Appeals concluded that whether Sonitrol’s conduct was willful and wanton is a question of fact for the jury to determine. Accordingly, the Court of Appeals further concluded that the district court was premature in granting summary judgment as to the applicability of the limitation of liability clause.

The summary judgments were reversed, and the cases remanded to the district court for further proceedings consistent with this opinion.

**OHIO TRIAL COURT ERRED IN EXCLUDING EXPERT’S FIRE TESTIMONY MEETING 921’S REQUIREMENTS**

In *Gilmore v. Village Green Management Co. et al*, 2008 Ohio 4566, <http://www.sconet.state.oh.us/rod/docs/pdf/8/2008/2008-ohio-4566.pdf>, the Court of Appeals of Ohio, Eighth Appellate District reviewed a trial court’s decision to exclude a fire expert’s testimony.

Plaintiffs-appellants, Matthew Gilmore, et al. (“plaintiffs”), appealed from a decision of the Cuyahoga County Court of Common Pleas, which partially granted defendants-appellees, Village Green Management Co., Village Green of Beachwood LP, and Village Green Residential Properties LTD’s (collectively referred to as “the Village”), motion to exclude plaintiffs’ expert witness’s opinion that negligent construction in the Village Green apartments caused an electrical fault in the floor and ceiling space, which caused a fire to devastate the plaintiffs’ apartments. Plaintiffs sought to reverse the trial court’s grant of summary judgment to the Village as to all of plaintiffs’ claims. The court found that the trial court erred in barring plaintiffs’ expert witness’s testimony, and that the grant of summary judgment to the Village was therefore improper and reversed and remanded.

A review of the record reveals the following: On February 2, 2004, at approximately 1:58 p.m., Beachwood firefighters were called to Building 3 of the Village Green of Beachwood apartment complex in Beachwood, Ohio, after a passerby noticed flames near the patio of a first floor apartment moving up the side of the building. The fire progressed very rapidly through Building 3 destroying the wooden floor spaces and the roof. The Beachwood Fire Department extinguished the fire after approximately six hours. Although no one was injured, there was considerable property damage, and the following day, approximately one-third of Building 3 was demolished by a track hoe.

Immediately following the fire, the Beachwood Fire

and Police Departments began investigating the cause of the fire, including an evaluation of the scene, taking photographs, and talking to witnesses and residents. Ten days after the fire, the Beachwood Fire Department retained an expert, a fire investigation and electrical expert, to assist in their investigation.

Following an extensive investigation, including an on-site investigation and analysis of the evidence obtained and collected, he tendered a technical analysis report to the City of Beachwood Fire Department on May 21, 2004. In this report, he concluded that the fire originated in the floor space below level 3 and the ceiling space above level 2 of Building 3. Although he noted that “the exact fire cause and mode of failure will probably never be identified due to the destruction of the site and pertinent evidence,” he nonetheless concluded, relying upon facts in evidence and the elimination of all other potential causes, that the cause of the fire was an electrical fault in the floor and ceiling space between levels 2 and 3 of Building 3. He was subsequently retained as an expert for the plaintiffs.

The plaintiffs filed a complaint against the Village alleging that the Village’s negligent construction and/or maintenance of the building caused the February 2, 2004 fire. In support, they presented a preliminary report dated July 21, 2005, in which he opined that the fire was electrical in nature and resulted from negligent construction of the building. Specifically, he opined that missing wooden beams and negligent installation of the electrical feeder cables and wires caused the fire to occur and then rage out of control. Although he identified other potential factors that could have contributed to the cause of the fire, including water deterioration and water infiltration, he nonetheless specifically concluded that “the only feasible ignition source in this ceiling and floor area was the electrical wiring and wiring devices and the wiring junction and splice points.” He again noted that “the total and devastating destruction of the section of the building where the fire originated makes it impossible for anyone to pinpoint the exact point and mode of failure.”

The Village moved to exclude the expert’s testimony pursuant to Evid. R. 702, arguing that his opinions were merely speculative and could not meet the standards for admissibility of *Daubert v. Merrell, et al* (1993), 509 U.S. 579. The Village also moved for summary judgment, arguing that, if the expert’s testimony was excluded, plaintiffs could not prove causation, a necessary element of their claims against the Village.

A *Daubert* hearing was held on December 26 and 27, 2006 and January 8, 2007. At the hearing, the expert testified that he followed the scientific method described in the National Fire Protection Association 921 Guidebook for Fire Investigations (hereinafter the “NFPA 921”), a multi-step process that guides fire investigators through fire investigations using both inductive and deductive reasoning, in conducting his investigation. He testified that he conducted a physical examination of the site, collected evidence, formed a hypothesis, and then tested that hypothesis.

Continued on page 16

Based on his investigation, he determined that the cause of the fire was an electrical problem. He testified that he came to this conclusion after carefully ruling out all other possibilities such as arson, inadvertent negligence such as careless smoking, furnace failure, and the Village's theory that the fire started on a patio of an apartment on the first floor.

Having determined that the fire was electrical in nature, he testified that he investigated the cause of the electrical fire. Although he conceded that the exact fire cause could never be identified due to the total destruction of the building, he was still able to come to a conclusion, based upon a reasonable degree of scientific certainty, that the cause of the electrical fire was due to the negligent construction of the building. Specifically, he testified that (1) the open-web floor joist system used by the Village in constructing the building caused the fire to spread "totally [un]encumbered"; (2) that the gusset plates used to hold the wood slats in place were not cut to fit the specific needs of the 2x4's; (3) multiple electric feeder cables were placed under a single staple, which violates applicable building codes; and (4) multiple electric feeder cables were installed against the metal gusset plates, which causes "resistance heating" leading to fires.

On August 10, 2007, the trial court granted the Villages' motion in limine in part and excluded the expert's opinion that negligent construction caused the electrical fire. The trial court held that:

Defendant's motion in limine seeking to exclude the expert's testimony is denied. His opinion that the fire was electrical in origin may be admitted. His next conclusion--that the electrical problem causing the fire was necessarily the result of sloppy construction practices in running and fixing the electrical wires through the flooring braces--goes too far. It is an inference based upon an earlier inference. He first infers the electrical origin of the fire and then infers the electrical problem stemmed from defective construction. This is impermissible. He may only testify to the fire being electrical in origin.

The court further held that his opinion that the fire was caused by specific defects in the electrical wiring similar to those found in unburned parts of the building is too speculative to be heard by the jury.

The trial court also granted the Villages' motion for summary judgment on the grounds that the plaintiffs could not demonstrate that any actions or inactions on the part of the Village were the proximate cause of the fire.

It is from this judgment that plaintiffs appealed and raise two assignments of error for review.

I. The trial court abused its discretion by granting, in part, appellees' motion to exclude the expert testimony.

In their first assignment of error, plaintiffs argued that the trial court erred in excluding the testimony of their expert on the cause of the fire. As an initial matter, the Court of Appeals noted that the determination of the admissibility of expert testimony is within the discretion of the trial court and that such decisions will not be disturbed absent an abuse of discretion. *Valentine v. PPG Industries*, 110 Ohio St. 3rd

42, 4e.

Evid.R. 702 provides:

"A witness may testify as an expert if all of the following apply:

"(A) The witness's testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

"(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

"(C) The witness's testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

"(1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles:

: 16

“(2) The design of the procedure, test, or experiment reliably implements the theory;

“(3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.”

Here, the credentials and experience of the expert were not in dispute. Accordingly, the sole issue is whether his testimony is reliable.

In determining whether the opinion of an expert is reliable under Evid.R. 702(C), a trial court examines whether the expert’s conclusion is based on scientifically valid principles and methods. In evaluating the reliability of scientific evidence, several factors are to be considered: (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.

A court should not focus on whether the expert opinion is correct or whether the testimony satisfies the proponent’s burden of proof at trial. Moreover, evidence should not be excluded merely because it is questionable or confusing, since the experts’ opinions would be subject to cross-examination and the credibility of their conclusions left to the trier of fact.

Here, the expert noted that “the exact fire cause and mode of failure will probably never be identified due to the destruction of the site and pertinent evidence.” However, by employing the scientific method set forth in the NFPA 921, he testified, with a reasonable degree of scientific certainty, that the cause of the fire was electrical in nature and that the cause of the electrical fire was the negligent construction of the floor joists and the placement of the electrical feeder cables between the floor and ceiling of the second and third floors.

He testified that he reached this conclusion by personally inspecting the fire site, examining the evidence and speaking with numerous witnesses. He determined due to burn patterns that the fire originated in the floor space below Suite 311 and the ceiling space of Suite 211. He then made a determination as to the causes of the fire from this area of origin.

By using the deductive reasoning cited in the NFPA 921, he systemically eliminated other potential causes of the fire such as arson, inadvertent negligence such as careless smoking, furnace failure, or a potted plant on a first floor patio. It was through this method of deductive reasoning that he concluded that the sole possible cause of the fire was electrical in nature, and that the cause of the electrical fire was due to negligent construction. Specifically, he testified that (1) the open-web floor joist system used by the Village in constructing the building caused the fire to spread “totally [un]encumbered”; (2) that the gusset plates used to hold the wood slats in place were not cut to fit the specific needs of the 2x4’s; (3) multiple electric

feeder cables were placed under a single staple, which violates applicable building codes; and (4) multiple electric feeder cables were installed against the metal gusset plates which causes “resistance heating” and leads to fires. While he admitted that water deterioration and oxidation “could” have contributed to the problem, he still opined, with a reasonable degree of scientific certainty, that faulty installation of the wiring was the cause of the electrical fire.

Contrary to the trial court’s finding, the Court of Appeals did not find the expert’s conclusion that negligent construction caused the electrical fire was merely “speculative” or “an inference based upon an inference.” His finding that the fire was electrical in nature is based on the scientific method established by the NFPA 921. Specifically, he came to this conclusion based on his own observations, data collected, documents reviewed, witness accounts, and because he had ruled out all other possibilities.

Similarly, his finding that the electrical fire was caused by faulty construction is also based on the scientific method established by the NFPA 921. His conclusion that the fire was caused by negligent construction is supported by facts independent of his determination that the fire was electrical; to wit: damaged cables, missing floor joists, exposed edges of the metal gusset plates, and multiple cables under one staple.

While the Village provided their own experts, who opined that the fire started on a first floor patio and was not due to an electrical fire, his opinion (as well as that of the Village’s experts) would be subject to cross-examination. The court’s role as gatekeeper does not focus upon the conclusions that an expert draws. When a competing expert points out weaknesses in the strength of an expert’s conclusion, it does not turn the challenged expert’s conclusion into the type of “subjective belief or unsupported speculation,” which Daubert prohibits. A challenged expert’s testimony does not have to sustain, at the time of summary judgment, the offering party’s burden of proof at trial.

Assignment of Error I was sustained.

II. The trial court erred by granting appellees’ motion for summary judgment as genuine issues of material fact exist and appellees are not entitled to judgment as a matter of law.

The trial court granted summary judgment to the Village in the absence of some of the expert’s testimony, concluding that plaintiffs could not advance a material fact relevant to causation. It stated that Plaintiffs have offered no evidence that Defendants’ conduct in any way caused or contributed to cause the fire because the expert opinion as allowed by the Court indicates that he cannot say what precisely caused the electrical problem giving rise to the fire.

An appellate court reviews a grant of summary judgment de novo, the same standard used by the trial court. Pursuant to Civ.R. 56, a trial court is required to construe the evidence in a light most favorable to the non-moving party, determine whether any genuine issues of material fact existed,

Continued on page 18

*Legal updates...continued from page 17*

and determine whether reasonable minds could differ as to whether judgment should be entered against the non-moving party. An appellate court, reviewing a grant of summary judgment, also examines the record in the light most favorable to the party opposing the motion.

In the first assignment of error, the Court of Appeals held that the expert's testimony was relevant and reliable on the issue of causation; to wit: his opinion that negligent installation of electrical cables and negligent construction of floor joists caused the

electrical fire in Building 3. Given that both parties offer competing expert testimony as to the cause of the fire that destroyed the plaintiffs' belongings, the Court of Appeals found that summary judgment was improperly granted.

Reversing summary judgment on the basis of the trial court's improper evidentiary ruling is proper because it affects the substantial rights of the adverse party. In its grant of summary judgment, the trial court explicitly relied on the fact that the plaintiffs had no expert witness to establish causation in order to conclude that they could not advance a genuine issue of fact. The prejudice to plaintiffs is clear.

Assignment of Error II was sustained.

For the foregoing reasons, the Court of Appeals reversed with respect to plaintiff's expert testifying on the issue of causation. The grant of summary judgment was also reversed and remanded for further proceedings consistent with this opinion.

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**CCAI  
welcomes  
Peter  
Lynch  
back from  
Iraq**