

NEWSLETTERS

The Ninth Circuit Assumes The Role Of Gatekeeper To Determine Expert Witness Relevancy And Reliability

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Earlier this year, the Ninth Circuit issued a decision overruling its previous requirement that *Daubert* findings always be made by the district court. The Ninth Circuit essentially made itself a reviewing gatekeeper of sorts regarding the reliability and admissibility of expert witnesses.

In *Estate of Barabin v. AstenJohnson, Inc.*, the Ninth Circuit, *en banc*, overruled a previous Ninth Circuit case, *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053 (9th Cir. 2002), which required that *Daubert* findings always be made by the district court. 740 F.3d 457, 467 (9th Cir. 2014). In *Barabin*, plaintiffs brought suit against AstenJohnson and Scapa alleging occupational exposure to asbestos, which plaintiffs alleged caused the decedent's mesothelioma. *Id.* at 461. AstenJohnson and Scapa filed motions *in limine* to exclude two of plaintiffs' expert witnesses, Kenneth Cohen and Dr. James Millette. *Id.* AstenJohnson and Scapa argued that Mr. Cohen was not qualified to testify as an expert and his theory was not the product of scientific methodology and that Dr. Millette's tests were unreliable because his methodology was not generally accepted in the scientific community. *Id.* The defendants also sought to exclude testimony from any expert regarding the "every asbestos fiber is causative" theory. *Id.*

Without holding a *Daubert* hearing, the district court excluded Mr. Cohen as a witness because of his "dubious credentials and his lack of expertise with regard to dryer felts and paper mills." *Id.* The district court allowed Dr. Millette's testimony with the caveat that the jury was informed that his tests were "performed under laboratory conditions which are not the same as conditions at the mill." *Id.* The district court also allowed testimony regarding the "every exposure" theory, "in the interest of allowing each party to try its case to the jury," despite finding a strong divide in the scientific community and courts regarding the theory's relevance to asbestos cases. *Id.*

The plaintiffs filed a motion requesting a pretrial *Daubert* hearing regarding Mr. Cohen as an expert witness. *Id.* at 461-62. The district court rejected the motion for a pretrial *Daubert* hearing and, instead, reversed its decision to exclude Mr. Cohen's expert testimony, explaining only that plaintiffs "did a much better job . . . of presenting . . . the full factual basis behind Mr. Cohen testifying and his testimony in other cases." *Id.* at 462. Both experts testified at trial, over defendants' objections, and judgment was entered in favor of the plaintiffs in the amount of \$9,373,152.12. *Id.*

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Defendants filed an appeal to the Ninth Circuit, which was heard by a three judge panel. *Id.* The Ninth Circuit unanimously held that the district court failed to make the necessary relevancy and reliability findings required under *Daubert*, thus abusing its discretion, and remanded to the district court for a new trial pursuant to *Mukhtar v. Cal. State Univ.*, 299 F.3d 1053 (9th Cir. 2002). *Id.* Plaintiffs petitioned the Ninth Circuit to rehear *en banc*, and a majority of the non-recused active judges voted to rehear the case. *Id.*

The Ninth Circuit examined the district court's record and determined that the district court abused its discretion by failing to assume its role as gatekeeper with regard to the expert testimony of Mr. Cohen and Dr. Millette. *Id.* at 464. The court found that there was no evidence in the record that the district court "assessed, or made findings regarding, the scientific validity or methodology of Mr. Cohen's proposed testimony." *Id.* Regarding Dr. Millette's testimony, the Ninth Circuit determined that instead of making determinations of relevancy and reliability, the district court punted those concerns to the jury to determine, again failing in its role as gatekeeper. *Id.*

The court then conducted a harmless error review, and determined that the plaintiffs could not rebut the presumption of prejudice caused by the improperly admitted testimony. *Id.* at 464-65. After finding that the improperly admitted expert testimony was prejudicial, the Ninth Circuit discussed that under *Mukhtar*, an erroneous admission of prejudicial expert testimony required a new trial, as the court under *Mukhtar* required that *Daubert* findings always be made by the district court. *Id.* at 467. The defendants argued that the reviewing court, in this case, the Ninth Circuit, should have the authority to make *Daubert* findings based on the record established by the district court. *Id.* The Ninth Circuit agreed with the defendants' argument and overruled *Mukhtar*, to the extent that it required that *Daubert* findings always be made by the district court. *Id.* (citing *Mukhtar*, 299 F.3d at 1066 n. 12). The court determined that "[i]f the reviewing court decides the record is sufficient to determine whether expert testimony is relevant and reliable, it may make such findings." *Id.* The court went further and determined that if the evidence was inadmissible at trial and the remaining admissible evidence was insufficient to constitute a case, the reviewing court may direct entry of judgment as a matter of law. *Id.* (citing *Weisgram v. Marley Co.*, 528 U.S. 440, 446-47, 120 S.Ct. 1011, 145 L.Ed.2d 958 (2000)).

The Ninth Circuit determined that it could not make a determination regarding the admissibility of the expert testimony because the record was too sparse to determine whether the expert testimony was relevant and reliable. *Id.* The court vacated the district court's judgment and remanded for a new trial because the district court abused its discretion in failing to make gateway determinations and the error was prejudicial because the erroneously admitted evidence was essential to the plaintiffs' case. *Id.*

Post *Barabin*, the Ninth Circuit now has the authority to make *Daubert* rulings based on the record established by the district court. This can be a double edged sword for defendants. On the one hand, the Ninth Circuit can now make such findings that were previously solely within the purview of the district court, and overrule erroneous determinations of expert relevancy and reliability, assuming the district court's record contains evidence to support its determinations. Improperly excluded

testimony can also be reviewed, and determined to be admissible under the *Barabin* determination. See *Pyramid Technologies, Inc. v. Hartford Cas. Ins. Co.*, No. 11-56304, 2014 WL 2086078, at *1 (9th Cir. May 19, 2014) (Ninth Circuit held district court abused its discretion in excluding expert evidence). However, on the other hand, this adds another issue that can be brought up on appeal, which could also add to time and expenses incurred in defending a claim.

For more information about this topic and the issues in this article, please contact Alex Barnstead in our Indianapolis office at (317) 231-7737 or at abarnstead@btlaw.com.

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