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# Summary Judgment and Expert Evidence: Comment and Update

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In Judge Schwarzer's and Katherine E. McCarron's paper, they explored the relationship between expert admissibility and summary judgment, and noted some tactical advantages in challenging an expert's admissibility in a summary judgment motion. Those advantages, however, can be increased by coupling a motion for summary judgment with a motion *in limine* to exclude inadmissible expert evidence. Together, the two motions bridge any gaps a summary judgment motion alone may leave, and should be considered as powerful weapons in a defendant's litigation arsenal.

As an initial matter, while courts are not required to hold a hearing on expert admissibility, a motion for summary judgment may be denied as untimely if "made before [a court] has had the opportunity to hold a *Daubert* hearing and consider the admissibility of Plaintiff's proffered expert testimony." *McConaghy v. Sequa Corporation*, 294 F. Supp. 2d 151, 168 (D.R.I. 2003) (noting a *Daubert* motion *in limine* is the proper vehicle for challenging an expert's admissibility and denying defendant's summary judgment motion as premature). If the court postpones deliberation of the admissibility issue until there is a *Daubert* hearing, as the court did in *McConaghy*, the opposing party will have previewed its adversary's arguments in the summary judgment papers and will have the opportunity to supplement its expert's submissions or prepare testimony to bolster the expert's admissibility during the *Daubert* hearing. Thus, the earlier the motion for summary judgment is made in the course of litigation, the more the opportunities may exist to enhance expert evidence admissibility. On the other hand, by making a motion *in limine* challenging an expert's admissibility on *Daubert* grounds together with a motion for summary judgment, the admissibility issue will be appropriately raised for the court without alerting the expert's proponent ahead of time.

A motion for summary judgment will also be strengthened by the addition of a motion *in limine*, which courts will address first when the challenged evidence is important to the outcome of the summary judgment motion. *Norfolk Southern Corp. v. Chevron U.S.A., Inc.*, 279 F. Supp. 2d 1250, 1268 (M.D. Fl. 2003) (because of the significance of the expert testimony to plaintiffs' case, the court decided the *in limine*

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motion before the motion for summary judgment); *Hudgens v. Bell Helicopters/Textron*, 328 F.3d 1329, 1338 (11th Cir. 2003) (affirming decision to strike expert testimony and, where there was no longer an issue of material fact, granting summary judgment). For example, the opponent can offer alternative grounds for summary judgment to ensure a positive result regardless of the outcome of the motion *in limine*. The moving party can argue the adversary cannot meet a necessary element of its case without excluded testimony of the expert, and in the alternative, if the expert is admitted, the expert's testimony is insufficient to establish key elements of the proponent's case. The outcome of the motion *in limine* therefore, will not hinder the success of a motion for summary judgment, nor will the summary judgment motion be contingent upon the exclusion of the expert. Additionally, by addressing the expert's admissibility separately in a motion *in limine*, the court's focus for the motion for summary judgment will not be diverted by an admissibility hearing.

Another potentially important advantage of employing both motions simultaneously is that the burden shifts in a motion *in limine*. As noted in the Schwarzer/McCarron paper, the party moving for summary judgment must satisfy the initial evidentiary burden. The party can meet the burden in one of two ways: by demonstrating that because the expert evidence is inadmissible, the opponent cannot meet an essential element of their case, or by producing evidence to negate an essential element of the opponent's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In a motion *in limine*, however, the proponent must prove his expert is admissible by a preponderance of the evidence. *See Norfolk Southern Corp.*, 279 F. Supp. 2d at 1268. If the proponent cannot meet his burden, the court will grant the motion *in limine* and the associated motion for summary judgment will be much easier to win. *See id.* (granting motion *in limine* excluding expert testimony and granting summary judgment)*; Hudgens*, 328 F.3d at 1345 (same); *Dunn v. Sandoz Pharmaceuticals Corp.*, 275 F. Supp. 2d 672, 684 (M.D.N.C. 2003) (same); *El Aguila Food Products Inc. v. Gruma Corp.*, 2003 WL 23220737, *19 (S.D. Tex. 2003) (same).

The decision to hold a *Daubert* hearing rests entirely within the courts' discretion. *See Group Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753, 761 (8th Cir. 2003) (where parties had "an adequate opportunity to be heard," it was not an abuse of

discretion to fail to hold an evidentiary hearing prior to *Daubert* ruling); *Colon v. Bic USA, Inc.*, 199 F. Supp. 2d 53, 70 (S.D.N.Y. 2001) (citing Michael H. Graham, 2 *Handbook of Federal Evidence* § 702.5 (5th ed. 2002)). Frequently, courts will not entertain a full *Daubert* hearing when considering a motion *in limine* but will decide the matter on the papers, unless novel issues of science are raised. *See United States v. Nichols*, 169 F.3d 1255, 1263 (10th Cir. 1999) (district court did not abuse its discretion when it declined to hold a preliminary evidentiary hearing because the challenged evidence did not involve new or novel scientific theories or methods); *Norfolk Southern Corp.,* 279 F. Supp. 2d at 1269 (where court held a non-evidentiary *Daubert* hearing and reviewed evidence, an additional evidentiary hearing was not necessary to assist the court).

When the same expert challenge is presented as a motion for summary judgment, however, courts may be more reluctant to decide expert admissibility without a full development of the facts and evidence lest the parties not have a full opportunity to be heard on the issue. *See In re Paoli Railroad Yard PCB Litigation,* 916 F.2d 829, 855 (3rd Cir. 1990) (holding exclusion of expert evidence provided grounds to set aside grant of summary judgment where plaintiffs did not have an *in limine* hearing and were denied oral argument on evidentiary issues). Indeed, where admissibility turns on factual issues, it may be an abuse of discretion for a court to grant summary judgment without an *in limine* hearing. *See Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3rd Cir. 1999) ("when the ruling on admissibility turns on factual issues, … at least in the summary judgment context, failure to hold such a hearing may be an abuse of discretion"); *Colon*, 199 F. Supp. 2d at 70 (same).

If the court does hold a full hearing on the expert's admissibility, the opponent will have an opportunity to disqualify the expert on the stand and, at the very least, will have the opportunity to preview her adversary's case, better enabling her to prepare her own expert for trial. *See Johnson v. Vane Line Bunkering, Inc.*, 2003 WL 23162433 (E.D. Pa. 2003) (although court ultimately denied motion *in limine* and motion for summary judgment, it provided extensive review of the strengths and weaknesses of challenged expert).

Finally, by preserving the admissibility issue in a separate motion, the moving party can ensure the proper standard of review will be applied on appeal. In *General Elec. Co. v. Joiner*, 522 U.S. 136, 142-143 (1997), the Supreme Court ruled decisions regarding admissibility of expert testimony are reviewable under the abuse-of-discretion standard, even where the decision is outcome-determinative as part of a summary judgment motion. Summary judgment motions, however, are reviewed de novo. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 465, n. 10 (1992). Presenting the issues as two separate motions will make certain that in the event one or both decisions is appealed, there will be no confusion about the appropriate standard for review.

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