IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
AIKEN DIVISION

Avondale Mills, Inc. and Factory Mutual Insurance Company, Plaintiffs, v. Norfolk Southern Corporation and Norfolk Southern Railway Company, Defendants.	)	C/A No. 1:05-2817-MBS **A M E N D E D** **O R D E R**

The within action alleges damage to property and business interests of Plaintiff Avondale Mills, Inc. arising out of a train collision and derailment in Graniteville, South Carolina, on January 6, 2005. This matter is before the court on motions in limine filed by Defendants on August 7, 2007 (Entries 574, 581, 583, 585, 589, 591, and 593). Defendants seek to exclude the testimony of a number of expert witnesses on the grounds of lack of reliability pursuant to Fed. R. Evi. 702 and Daubert v. Merrell Dow Pharms., 509 U.S. 579 (1983). The proposed witnesses include experts in scientific or technical matters as well as experts in nonscientific matters.

Rule 702 provides:

> Testimony by Experts. 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 upon 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 Rule 702, the court's role in considering the admissibility of expert testimony is to assess whether the evidence is sufficiently reliable and relevant. See Kumho Tire Co, Ltd. v.

Carmichael, 526 U.S. 137, 152 (1999). The focus of the court should be on the "principles and methodology" employed by the expert, and not on the conclusions reached. See Daubert, 509 U.S. at 594-95. Factors that may be considered are (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review or publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. United States v. Crisp, 324 F.3d 261, 266 (4th Cir. 2003) (quoting Daubert, 509 U.S. at 593-94). "A reliable expert opinion must be based on scientific, technical, or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods." Oglesby v. General Motors Corp., 190 F.3d 244, 250 (4th Cir. 1999).

The Daubert factors do not always fit neatly into or easily translate in the context of nonscientific testimony. Voilas v. General Motors Corp., 73 F. Supp. 2d 452, 461 (D.N.J. 1999). Indeed, the inquiry into an expert's reliability may focus instead upon personal knowledge or experience. Kumho Tire, 526 U.S. at 150; see also Voilas, 73 F. Supp. 2d at 461 (observing that, in the nonscientific context, "the qualifications of the expert will be of particular importance. This is so because in the nonscientific world, theories are often not subject to testing or experimentation. Although the focus of the inquiry must still be on verification of the expert's methodology, the inquiry is more difficult because much nonscientific expert testimony is based on the experience of the expert, instead of the experimentation."). Plaintiffs, as the parties offering the expert testimony, have the burden of showing by a preponderance of the evidence that the expert's testimony is

admissible. See Thompson v. Queen City, Inc., 2002 WL 32345733 at *1 (D.S.C. 2002); Cooper v. Smith & Nephew, Inc., 259 F.3d 194, 199 (4th Cir. 2001).

* * *

The motions have been fully briefed. The parties argued their respective positions at a hearing on October 10, 2007. The court has considered the motions, memoranda, exhibits, and arguments of counsel. The court finds and concludes as follows.

1. Motion to Exclude the Expert Testimony of Van Allen May (Entry 574). Plaintiffs offer Mr. May to give his expert opinion regarding the business plan developed by Avondale, Inc. The court finds that Mr. May's opinions do meet the Daubert standard. His opinion is based on conversations with Messrs. Felker and Altherr. Mr. May received no documentation regarding the plan and was not familiar with Avondale, Inc.'s financial condition, operations. or equipment. There is no evidence that Mr. May undertook any independent evaluation of Avondale, Inc.'s business plan and strategies. Defendants' motion to exclude this witness is granted.

2. Motion in Limine to Exclude the Expert Testimony of George Easton (Entry 581). Plaintiffs offer Mr. Easton to rebut opinions of Defendants' experts, Messrs. Garrity and McKinney. The court concludes that Defendants' motion should be denied. Mr. Easton will be allowed to testify regarding the statistical significance of the data collected and to offer his conclusions regarding the statistical methods utilized by Defendants' experts. He is prohibited from drawing conclusions from his statistical analysis regarding the effect of the derailment on the Graniteville facilities.

3. Motion in Limine to Exclude Certain Expert Opinions of Lloyd Crosthwait (Entry 583). Plaintiffs retained Mr. Crosthwait to analyze the extent of damage to control boards and whether electronics equipment could be cleaned sufficiently or had to be replaced. The court

concludes that Mr. Crosthwait's opinions are derived from generally-acceptable principles of electronics, mathematics, and physics, and that they are relevant to the issues in this case. Defendants' contentions regarding this expert more properly are subjects for cross examination. Defendants' motion is denied.

4. Motion in Limine to Exclude the Expert Testimony of George W. Pearsall (Entry 585). Plaintiffs engaged Mr. Pearsall to provide his opinion on the nature of chlorine-induced damage to Avondale's equipment, chlorine's role in the corrosion of metals such as structural steel and stainless steel, and whether that equipment could be remediated by cleaning. It is the court's understanding that the purpose of Mr. Pearsall's testimony is to aid the jury in understanding technical information that will utilized throughout the trial. Mr. Pearsall's testimony will be limited to this purpose. Defendants' motion is denied.

5. Motion in Limine to Exclude Testimony of Lisa Detter-Hoskin (Entry 589). The court has thoroughly reviewed Ms. Detter-Hoskin's deposition. Her deposition reveals that the GTRI sonic method on which she basis her testimony has not been published, submitted to any peer-reviewed journal, or submitted to any testing organization. The GTRI sonic method was developed specifically for the within litigation. The court concludes that Ms. Detter-Hoskin's opinions do not meet the Daubert standard. Defendants' motion is granted.

6. Motion in Limine to Exclude Testimony of John Slater (Entry 591) . Mr. Slater is a metallurgist who has worked and consulted in the industry for nearly forty years. The court concludes that Mr. Slater will be allowed to offer his opinion regarding the cleaning procedures used at Graniteville. Defendants' motion is denied.

7. Motion in Limine to Exclude Expert Testimony of Jeffrey Schwenk (Entry 593). Mr. Schwenk is offered as an expert in catastrophe restoration services. Mr. Schwenk would be allowed to testify regarding matters within his personal knowledge, such as the scope of repairs and his opinion regarding the best methods for cleaning up and restoring property. Mr. Schwenk will be prohibited from offering his opinion with respect to causation or other scientific testimony. Defendants' motion is denied.

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The court has ruled on a number of motions in limine regarding the admissibility of certain experts. The court cautions the parties that its rulings do not signal approval of the unfettered use of expert testimony. Experts will not be permitted to offer repetitive, cumulative, or irrelevant testimony.

IT IS SO ORDERED.

/s/ Margaret B. Seymour
United States District Court

Columbia, South Carolina

November 5, 2007.