IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

BENNIE NELL MORROS **PLAINTIFF**

VS. **CIVIL ACTION NO.: 2:11cv254-MPM-JMV**

STATE FARM FIRE & CASUALTY INS. CO. **DEFENDANT**

RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO EXCLUDE OR LIMIT THE TESTIMONY OF PLAINTIFF'S REBUTTAL EXPERT ROBERT PAINTER

COMES NOW, J. Wesley Hisaw, Attorney for the Plaintiff, Bennie Nell Morros, herein after referred to as [Bennie] in the above-styled and numbered cause and files this her Response in Opposition to Defendant's Motion to Exclude or Limit the Testimony of Plaintiff's Rebuttal Expert Robert Painter and would respectfully show unto the Court the following to wit:

A. Daubert Standard and traditional and appropriate method of questioning expert testimony.

A party offering the expert bears the burden of only proving by a preponderance of evidence that the expert's opinion is reliable, not that the opinions are correct. *Moore v. Ashland Chemical, Inc.,* F.3d 269, 279 (5th Cir. 1998). The prohibition against "*ipse dixit*" assurances of reliability applies with equal force to the challenging party. *General Elec. Co. v. Joiner,* 522 U.S. 146 (1997). If the challenging party only "reveal[s] there are areas of [the expert's] application of methodology that present real and potential problems regarding [the expert's]

ultimate credibility with the tier of fact…these deficiencies go to the weight of the testimony, not the admissibility." *Thompson v. Rook,* 255 F.Supp. 2d 584, 587 (E.D. Tex. 2001). When the court accesses the arguments made for and against the admission of the expert, "[t]he court must not invade or supplant the adversarial system and right to jury trial." *Thompson v. Rook,* 255 F.Supp. 2d 584, 587 (E.D. Tex. 2001). A party does not need to show that it will win or lose on the merits, only that the Federal Rules of Evidence have been satisfied. *Mathis v. Exxon Corp.,* 302 F.3d 448, 459-60 (5th Cir. 2002).

B. Reliability

A district court *may* consider several factors that *Daubert* indicated might "bear on" a judge's gate-keeping determination, including: whether a "theory or technique . . . can be (and has been) tested"; whether it "has been subjected to peer review and publication";whether, in respect to a particular technique, there-is a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and Whether the theory or technique enjoys "general acceptance" within a "relevant scientific community." *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 149-50 (1999); citing *Daubert,* 509 U.S. 592-94. The emphasis on the word "may" reflects *Daubert's* description of Federal Rule of Civil Procedure 702's inquiry as "a flexible one." *Id.,* citing 509 U.S. at 594. The factors *Daubert* mentions do not constitute a "definitive checklist or test." *Id.,* citing 509 U.S. at 593. The gatekeeping inquiry must be "'tied to the facts' of a particular "case." *Id,* citing *Daubert,* 509 U.S. at 591 (quoting *United States v. Downing,* 753 F.2d 1224, 1242 (CA3 1985)).

The factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 150. All the factors listed in *Daubert*

are neither automatically rule in or out of the trial court's consideration of the reliability of an expert's opinion. *Daubert's* list of factors is intended to be helpful, not definitive. *Id.*

ARGUMENT

A. The Expert Testimony is based on Mr. Painter's knowledge, training, education, and experience.

In the Motion filed by the Defendant, it is extremely hard to tell what basis State Farm has to challenge Mr. Painter's opinions other than they disagree with him. The generic argument made seems to be that because he does not cite to some industry standard reference material, he is not qualified to testify. This is simply not the law.

The Defendant starts off with nothing more than a generic personal attack on Mr. Painter because he routinely testifies for Plaintiff's in these type of cases and is criticized by other experts because Mr. Painter criticizes their opinions. This really has nothing to do with Mr. Painter's qualifications under *Daubert*. Conversely, the same could be said of the Defendant's expert George Plackey who normally testifies for insurance companies and does a great deal of work for the Defendant.

Expert testimony is admissible under FED. R. EVID. 702 which provides as follows:

> 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.

The facts or data upon which an expert may base an opinion are specified in FED. R. EVID. 703:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known

> to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

Daubert requires the district court to perform the role of a gatekeeper to determine the admissibility of all forms of expert testimony, even the non-scientific testimony at issue here. The Supreme Court has emphasized that "[t]he inquiry envisioned by Rule 702 is . . . a flexible one," and must be "tied to the facts of a particular case." *Kumho Tire,* 526 U.S. at 150 (internal quotation marks omitted). "Concerning the reliability of non-scientific testimony such as [Tide's/Jens'], the '*Daubert* factors (peer review, publication, potential error rate, *etc*.) simply are not applicable to this kind of testimony, whose reliability depends heavily on the *knowledge and experience* of the expert, rather than the methodology or theory behind it.'" *Hangarter*, 373 F.3d at 1017 (quoting *Mukhtar v. California State Univ.*, 299 F.3d 1053, 1059 (9th Cir. 2002)) (emphasis in original).

The rejection of expert testimony is the exception rather than the rule, and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." Fed. R. Evid. 702 advisory committee's notes (2000 amendment) (quoting *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir.1996)). "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596.

In the case of non-scientific expert testimony, the court must have "considerable

leeway in deciding . . . how to go about determining whether particular expert testimony is reliable," because the [four specific] *Daubert* factors will not always translate easily to non-scientific opinions." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150-52 (1999). Where, as here, expert opinion testimony is based solely on experience or training, application of the *Daubert* factors is unwarranted. *First Savings Bank, F.S.B. v. U.S. Bancorp*, 117 F.Supp.2d 1078, 1083 (D. Kan. 2000), *citing Compton v. Subaru of America, Inc*., 82 F.3d 1513, 1518 (10th Cir.), *cert. denied*, 117 S.Ct. 611 (1996). *See also* FED. R.EVID. 702. adv. comm. note (2000) ("In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony."); *Kumho Tire*, 119 S.Ct. at 1178 (recognizing appropriateness of expert drawing a conclusion from observations based on extensive and specialized experience).

Mr. Painter has extensive experience is forensic examinations and vehicle examinations. A copy of Mr. Painter's CV is hereby attached as Exhibit A. The record demonstrates that Mr. Painter has extensive experience and training in the field of vehicle forensics and forensic locksmithing. He is frequently consulted as an expert on the topic and has almost two decades of experience working with recovered vehicles, repairing an estimated 10,000 theft-recovered and fire-damaged vehicles. He has written extensively in the area and conducted numerous seminars on vehicle forensics, even being hired to train insurance company employees. He has clearly specialized in vehicle forensics and gained relevant experience. He has been qualified as an expert in numerous states and multiple circuits including the Fifth Circuit.

Mr. Painter's testimony is going to be concerning the incorrect methods Mr. Plackey used in conducting his investigation along with the areas Mr. Plackey failed to account for in his report. State Farm's sole argument seems to be that Mr. Painter cites to no specific authorities for his criticisms of Mr. Plackey's analysis. This is true as the relevant knowledge of Mr.

Painter was obtained from his experience and training. Incidentally, Mr. Plackey's opinions as noted in his expert designation are obtained in the same manner. See Exhibit B attached herewith. It is a really circular argument by State Farm that Mr. Painter cannot use his training, knowledge, and experience to attack the report of George Plackey that is based upon Mr. Plackey's knowledge, training, and experience in the same areas.

State Farm disputes with Mr. Painter's conclusions, which he derived examining the methodology used by Mr. Plackey. Cross examination is the appropriate method by which State Farm can question Mr. Painter's conclusion, but, otherwise, Plaintiff's right to a jury trial and to put on valid, reliable evidence such as Mr. Painter's opinion, should not be abrogated. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993); *Slaughter v. Southern. Talc Co.*, 919 F.2d 306 (5th Cir. 1990). All told, State Farm does not agree with Mr. Painter's conclusion. Such is not a reason to exclude his testimony. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 595 (1993); *Slaughter v. Southern Talc Co.*, 919 F.2d 306 (5th Cir. 1990).

What is really before the Court is a battle of the experts to the extent Mr. Plackey's testimony survives the Plaintiff's pending *Daubert* motion. As the Fifth Circuit has held, in a case of a "battle of the experts," "the jury must be allowed to make credibility determinations and weigh the conflicting evidence in order to decide the likely truth of a matter not itself initially resolvable by common knowledge or lay reasoning." *Garner v. Santoro,* 865 F.2d 629, 644 (5th Cir. 1989); *see also Foradori v. Harris,* -- F.3d..--, 2008 NAIL 853559, *31 (5th Cir. April 1, 2008) (quoting *Garner* regarding a "battle of the experts" and allowing a jury to determine "the likely truth of the matter').

Here we have two individuals, looking at the same test, and interpreting the data differently at to whether or not a conclusion can be made on how the Plaintiff's stolen vehicle was last driven. It is not proper to exclude an expert on that basis. In one Northern District case, the district court was faced with *Daubert* challenges regarding the analysis of two different experts, specifically regarding one expert's "interpretation. of relevant literature." *Whitfield v. Tronox Worldwide, LLC*, 2007 WE, 2127298, *4 (N.D.Miss. July 27, 2007). Ultimately Judge Davidson denied the motions to exclude, in part because "the difference of opinion as to how to properly interpret the literature is an argument best preserved for presentation to a jury." *Id.* at *4. In other words, where credibility is not the issue, and the only real disagreement is that one party does not like the expert's opinion, a jury should conclude which expert is "right."

With regard to Mr. Painter's specific opinions, State Farm cites no authority or anything else as a basis for excluding his opinions other than they do not agree with them and that they are unfavorable to them. State Farm makes very broad statements regarding specific portions of Mr. Painter's expert report but do not really state why it should be excluded.

<u>The First and Third opinions in the report of Mr. Painter.</u>

Mr. Painter showed in his first and third opinions that based on his knowledge, training, education, and experience, the procedures used by Mr. Plackey easily damage the components tested by Mr. Plackey which causes the loss of valuable evidence. Damage appeared to have occurred from the photos presented but the actual wafers were lost when Mr. Plackey transferred them. Mr. Painter is merely stating that based upon his training, the method used by Mr. Plackey is problematic and causes the loss of evidence which would show the vehicle was stolen and not driven with a properly programmed key which is Mr. Plackey's position. State Farm's

statements really go to their attempt to quibble about the weight to be given the evidence, not its admissibility.

The Second Opinion in Mr. Painter's report.

The second opinion in Mr. Painter's report is really an extremely minor issue. Mr. Painter is merely stating the Mr. Plackey had already presumptively eliminated a forced rotation of the Plaintiff's ignition extremely early based on certain assumptions Mr. Plackey made. This is an issue concerning the weight to be given to Mr. Plackey's testimony and is merely showing a flaw in the reasoning he used. As additionally noted by Mr. Painter, did not disagree with Mr. Plackey's opinion that there appeared to be no evidence of a forced rotation **based upon the photos provided.** (Page 79 line 24). This ties in with the other opinions of Mr. Painter that key evidence was lost in Mr. Plackey's examination which can never be replaced. This issue is relevant to undermine the credibility of Mr. Plackey's report.

The Fourth Opinion in Mr. Painter's report.

With regard to State Farm's contention regarding this, the issue with Mr. Plackey not using a set magnification means that no one can replicate Mr. Plackey's work to see what he allegedly saw regarding no evidence of the lock being tampered with. This helps the jury to understand how deficient the work of Mr. Plackey is.

The Fifth Opinion in Mr. Painter's report.

With regard to Mr. Painter's fifth opinion, he is merely stating that he can cut a key that will leave no marks in an ignition. One of the key areas of Mr. Plackey's opinion was that essentially, a newly cut key always leaves marks of some kind. Mr. Painter's opinion is that it does not. This is a classic swearing contest issue for the jury to decide which is not properly dealt with in the context of a *Daubert* motion.

B. Conclusion

Essentially, State Farm tries to pit each of Mr. Painter's against each other and view them in a vacuum. None of the opinions can be viewed separately, but collectively they go to the poor quality of work done by Mr. Plackey which is what Mr. Painter was designated as, a rebuttal expert. Frankly, it appears the motion filed is being used more to elicit the trial strategy of how the Plaintiff will use the testimony of Mr. Painter to undermine Mr. Plackey's opinion as opposed to whether or not the testimony is admissible.

WHEREFORE, PREMISES CONSIDERED, the Plaintiff moves that the Defendant's motion be denied in its entirety. Plaintiff further prays for general relief as the Court deems appropriate under the circumstances.

RESPECTFULLY SUBMITTED, this the 7th day of February 2013.

*/s/ J. Wesley Hisaw*_____
J. Wesley Hisaw, MSB# 101767
Attorney for Bennie Nell Morros
Holland Law, P.C.
3010 Goodman Road West, Suite A
P.O. Box 256
Horn Lake, Mississippi 38637
Telephone: 662-342-1333
Facsimile: 662-342-7321
Email: jwhisaw@hollandlaw.net

CERTIFICATE OF SERVICE

I, J. Wesley Hisaw, attorney for Bennie Nell Morros, do hereby certify that I have this date electronically mailed the above and foregoing to the following ECF participants:

H. Scot Spragins, Esq.
Hickman, Goza, & Spragins, PLLC
Attorneys at Law
Post Office Drawer 668
Oxford, Mississippi 38655-0668

THIS, the 7th day of February 2013.

*/s/ J. Wesley Hisaw*_____
J. Wesley Hisaw MSB 101767
Certifying Attorney