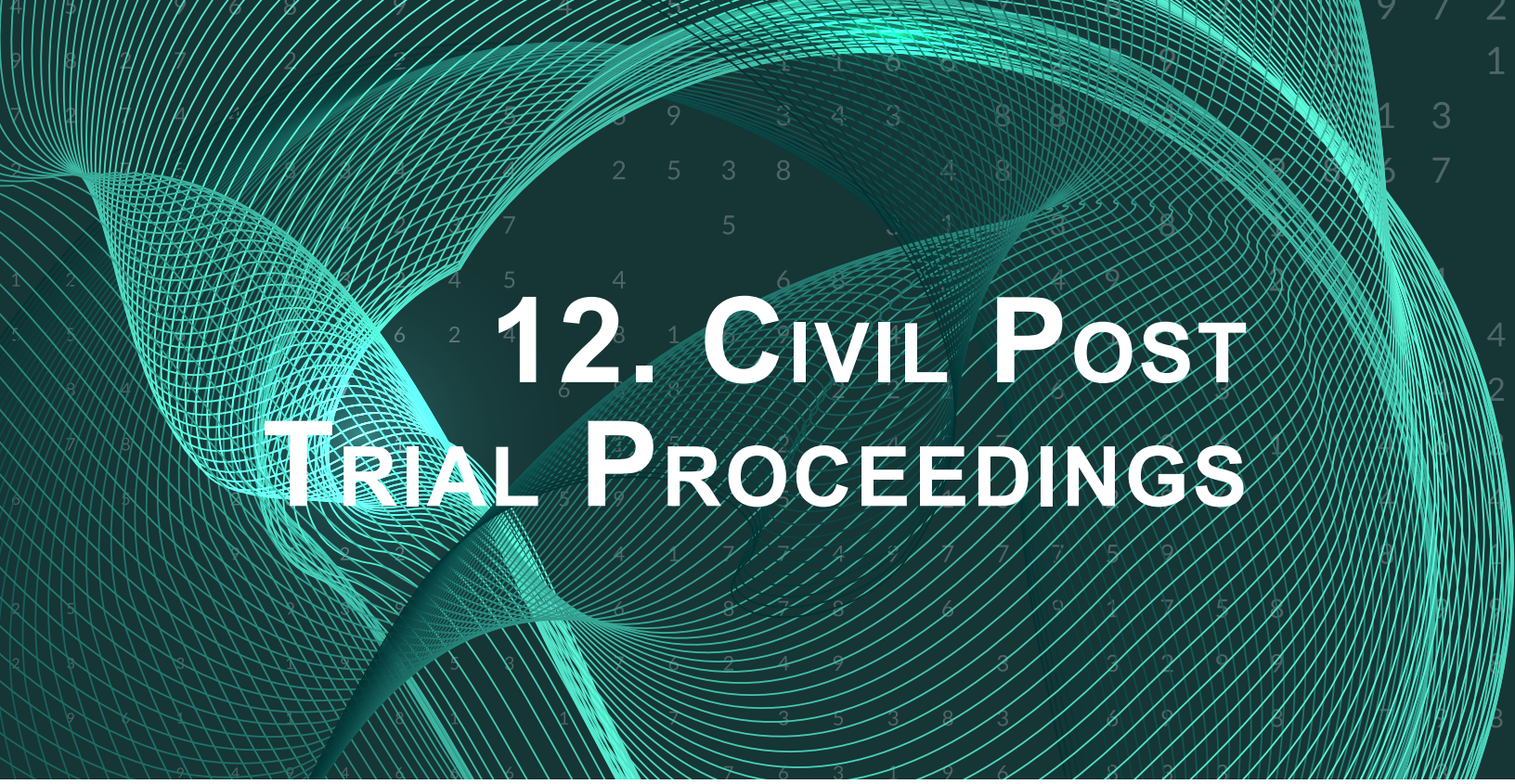

12. Civil Post Trial Proceedings

Sections 12.1 - 12.4

Hon. Joseph Maltese &
Hon. Brian MacKenzie (Ret.)

12.1 Offering New Scientific Evidence Post Judgment

After the jury renders a verdict for either the plaintiff or defendant, then the losing parties' counsel will typically renew their motions to dismiss the case again for failure to prove a *prima facie* case and/or to set aside the jury's verdict as against the weight of the credible evidence, or, in general, for a judgment notwithstanding the verdict (JNOV). Most courts will allow these dispositive motions to be made in writing where the parties can articulate, with specific references to the trial record, why the judgment should be set aside.

The Federal Rules of Civil Procedure (FRCP) 59 – New Trial; Altering or Amending a Judgment and FRCP 60 – Relief from a Judgment or Order provide the guidelines for post judgment motions involving scientific evidence.

One of the reasons specified in these motions to set aside the verdict is because the judge allowed testimony and/or other evidence to be admitted over the objection of the opponent. A classic civil case where this occurred in the realm of scientific evidence which was appealed to the U.S. Supreme Court was the case of *Weisgram v. Marley*, 528 U.S. 440 (2000). The following is a summary of that case. The facts in *Weisgram* flow from the death of Bonnie Weisgram who died due to carbon monoxide poisoning during a fire in her home. Her estate brought a strict products liability action alleging that either a defectively designed or defectively manufactured electrical heater caused both the fire and her death. Plaintiffs presented, over defendant's objections, three expert witnesses. The first expert was the fire captain on the scene who testified about the cause and origin of fires. However, over the objection of the defendants, he was allowed to opine that the electrical heater malfunctioned and that a vinyl floor and glue caused vapors that were ignited by the electrical heater.

The second expert was a "fire investigator" and "technical forensic expert," who was a master electrician in Ohio with experience in consulting on electrical fires. He was allowed to testify over defendant's objection. While never visiting the scene of the fire, nor performing any tests of a similar heater, he opined that the "volatile vapors from the adhesive (the linoleum glue) came into the location of the heater and caused the fire."

The third witness, a metallurgist, was qualified in the properties of metals, but not in fire causation and origins in baseboard heater operation, or in the design or testing of the metal contacts in such a unit. None of the plaintiff's experts ever tried to replicate the fire through testing a similar heater. The jury rendered a verdict in favor of the plaintiff in the sum of 5 million dollars. Defendants post-trial motions to dismiss were also denied.

The Eighth Circuit Court of Appeals, reversed the District Court as it found it had abused its discretion in erroneously admitting scientific opinions, which did not follow any scientific or technical methodology, but were instead based upon speculation and the *ipse dixit* of the proffered expert. The court then held that under FRCP. 50, the case need not be remanded for a new trial with a new expert, but can be dismissed outright by the court. The United States Supreme Court affirmed and directed entry of a dismissal without a new trial and alternative experts for the plaintiff. Justice Ginsberg writing for the majority said:

> Since *Daubert*, moreover, parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet.[1] It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail. We therefore find unconvincing Weisgram's fears that allowing courts of appeals to direct the entry of judgment for defendant will punish plaintiffs who could have shored up their cases by other means had they known their expert testimony would be found inadmissible . . . . In this case, for example, although Weisgram was on notice every step of the way that Marley was challenging his experts, he made no attempt to add or substitute other evidence.[2,3]

The court concluded that in order to avoid a dismissal, the valid [scientific] theory or methodology must be explored before proposing an expert opinion. Attorneys may not get another opportunity to change theories and experts after the motion to dismiss is granted at any stage of the proceedings: the pre-trial, during trial or post trial. There are no do-overs with a more qualified expert.

Courts will allow a do-over when the judge commits an abuse of discretion by allowing or excluding scientific expert testimony without properly applying *Daubert* criteria.[4]

The situation in states following the *Frye*[5] standard is more complex with some states allowing parties a second chance to obtain a new expert witness should their first try fail.[6] Therefore, judges in states following *Frye* should carefully examine their existing caselaw and apply the appropriate standards.

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12.2 Civil Commitments of Sexually Violent Predators

Civil commitments for sexual violent predators (SVP) generally follow a statutory scheme similar to those that allows a state to place someone who has mental illness in a mental institution when they pose a danger to themselves or to others.[7] Although these laws vary from state-to-state, in the main they share three common elements:

1. "the individual must have committed a qualifying sexual offense;
2. the individual must have a qualifying mental condition; and,
3. the individual's mental disorder creates a high probability that the person will commit new sexual offenses in the future due to a serious difficulty controlling his or her behavior."[8]

The Supreme Court in a 5 to 4 decision in *Kansas v. Hendricks*[9] upheld the Kansas SVP law as it was a civil action, not criminal, and could not violate the double jeopardy or ex post facto clause of the Constitution.[10] The Court further held that the requirements for commitment in the Kansas statute were sufficient to rebut any claims of violation of substantive due process requirements.[11]

Not all mental health professionals are experts in probabilistic theory and may need to rely on other's work. This in turn may raise gatekeeper questions that a judge must be aware of in states following Daubert.

The expert testimony provided by mental health professionals in SVP cases requires them to stuff medical diagnoses into the context of statutory language in effect, translating a mental health diagnosis to meet the legal elements necessary to support a judge ordering a civil commitment.

The first two elements required to prove an individual is a "sexually violent predator" tend not to be problematic under either *Frye* or *Daubert* standards, as most mental health professionals are qualified to render an expert opinion. The third element, predicting future dangerousness, often requires the use of a probabilistic

prediction model.[12] Not all mental health professionals are experts in probabilistic theory and may need to rely on other's work. This in turn may raise gatekeeper questions that a judge must be aware of in states following *Daubert*.

Courts in *Frye* criteria states by and large avoid this issue. As the Pennsylvania Supreme Court held in *Commonwealth v. Dengler*[13] under a traditional *Frye* analysis, that there is no need to conduct an evidentiary hearing regarding a sexual offender's likelihood of recidivism, because such evidence is not novel. The court held a *Frye* hearing is not required every time science comes into the courtroom; rather, only when the expert testimony involves novel science. It reasoned that because the legislature had provided a statutory framework defining when an individual is a sexually violent predator it must be generally accepted in the community of professionals who conduct such assessments and therefor, cannot be deemed "novel science."

On the other hand, the Illinois Court of Appeals in *In re Commitment of Field*[14] found that a trial court erred when it allowed in an actuarial instrument offered by the state without establishing that it had gained general acceptance in the psychological community that evaluates the risk of sex offender recidivism.

Courts in *Daubert* criteria states have a more complex task. In a decision that came down before *Daubert*, the Supreme Court in *Barefoot v. Estelle*,[15] held a Texas jury could sentence a defendant to the death penalty based upon two psychiatric experts testifying as to defendant's future dangerousness neither of whom had examined the defendant. The American Psychiatric Association (APA) filed an amicus brief containing a ferocious scientific assault on the state expert's prediction testimony. However, the Supreme Court rejected the APA's arguments, holding as there was no Constitutional bar preventing a state from requiring a jury to consider future dangerousness, there was likewise no limit on the methods a state could use to meet the burden, including the use of psychiatric testimony.

The court's subsequent decision in *Daubert* suggested to some legal commentators that the rational of *Barefoot* had been effectively overruled as it was "fundamentally at odds with the Court's pronouncement in *Barefoot*."[16] However, the Fifth Circuit Court of Appeals in *Johnson v Cockrell* rejected this argument stating: "We also

disagree that Johnson could have persuasively argued to the district court that *Daubert* … altered the admissibility of this type of evidence after *Barefoot*. Johnson cites no authority questioning the continued validity of *Barefoot*."[17]

The reasoning of *Cockrell* and other cases that have reached similar holdings have been criticized. The Supreme Court of Arizona in *Logerquist v. McVey*,[18] found *Barefoot* and *Daubert* to be irreconcilable: "*Daubert* does not mention *Barefoot*. Perhaps the Court intends to interpret Fed. R. Evid. 702 differently in criminal cases. But as the earlier survey of our cases shows, in criminal prosecutions we have not subjected testimony seeking to explain human behavior to any preliminary gatekeeping test of reliability. We do not believe different tests should apply in civil cases; to the contrary, rules determining the competency of evidence should apply across the board, whether the case is on the civil or criminal calendar. We find it hard to believe that evidence deemed admissible in prosecutions resulting in imposition of death or long terms of imprisonment should be held unreliable and therefore inadmissible in tort cases based on the same type of act that leads to many criminal prosecutions."

In a review of sexual violent preditor cases found under this flexible approach there were virtually no appellate decisions upholding challenges to expert prediction testimony.

The Texas Criminal Court of Appeals in *Coble v. State of Texas*[19] another death penalty case, also rejected the argument that *Barefoot* and *Daubert* could be reconciled. The court noted that all parties agreed the state's psychiatrist was clearly qualified to testify as to the defendant's mental health and to diagnosis that condition. It held however, that the trial judge abused his desecration by allowing testimony on the question of the defendant's future dangerousness saying: "Based upon the specific problems and omissions cited above, we conclude that the prosecution did not satisfy its burden of showing the scientific reliability of [the expert's] methodology for predicting future dangerousness by clear and convincing evidence during the *Daubert/Kelly* gatekeeping hearing in this particular case."[20]

In yet another death penalty case, the court in *Flores v Johnson*[21] noted that *Barefoot* was decided before a better understanding of the science was reached and held that: "On the basis of any evidence thus far presented to a court, it appears that the use of psychiatric evidence to predict a murderer's 'future dangerousness' fails all five *Daubert* factors."

Daubert criteria courts reviewing decisions about civil commitments under SVP statutes have developed a "flexible approach"[22] to the admission of expert testimony about future dangerousness. This approach is typified by the case of *Andrews v. State of Florida* which held:

> Other courts have recognized that 'the Daubert factors do not necessarily apply easily when considering the testimony of a mental health expert'. . . ."However, while courts seem to be in agreement that psychiatric and psychological expert opinions are difficult to analyze under Daubert, there also seems to be agreement that these opinions can be admitted because Daubert employs a flexible approach."23

A review of SVP cases found under this flexible approach there were virtually no appellate decisions upholding challenges to expert prediction testimony.[24] This failure to rigorously apply *Daubert* criteria in SVP cases has suggested to some commentators that courts are avoiding their gatekeeper responsibilities.[25]

12.3 Conclusion

Second chances are rare in the law. Students are taught in law school that putting an end to litigation by according a finality to judgments is a central objective of modern civil procedure. The goal of all litigation is a final judgment. Judges resist reopening the evidentiary record for any reason let alone one that is based upon the testimony of an expert witness.

12.4 Endnotes

1. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579; *see also* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999) (rendered shortly after the Eighth Circuit's decision in *Weisgram*); General Electric Co. v. Joiner, 522 U.S. 136 (1997).
2. *See* Lujan v. National Wildlife Federation, 497 U. S. 871, 897 (1990) ("[A] litigant's failure to buttress its position because of confidence in the strength of that position is always indulged in at the litigant's own risk.").
3. Weisgram v. Marley, 528 U.S. 440 at 456 (2000).
4. General Electric Co. v. Joiner, 522 U.S. 136 (1997).
5. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
6. *See e.g.* Guzman ex rel. Jones v. 4030 Bronx Blvd. Associates L.L.C., (861 N.Y.S.2d 298 (2008).
7. L.C. Hedman, *et al., State Laws on Emergency Holds for Mental Health Stabilization*, 65 PSYCHIATRIC SERVS. 529, 529-35, (May 2016). https://ps.psychiatryonline.org/doi/10.1176/appi.ps.201500205
8. ASSOC. FOR THE TREATMENT OF SEXUAL ABUSERS, CIVIL COMMITMENT OF SEXUAL OFFENDERS: INTRODUCTION AND OVERVIEW (2015). http://www.atsa.com/sites/default/files/%5BCivil%20Commitment%5D%20Overview.pdf
9. Kansas v. Hendricks, 521 U.S. 346 (1997).
10. *Id*.
11. *Id*.
12. GEORGE G. WOODWORTH & JOSEPH B. KADANE, EXPERT TESTIMONY SUPPORTING POST-SENTENCE CIVIL INCARCERATION OF VIOLENT SEXUAL OFFENDERS, 3 LAW, PROBABILITY & RISK 221 (2004).
13. Commonwealth v. Dengler, 890 A.2d 372 (Pa. 2005).
14. In re Commitment of Field, 813 N.E. 2nd 319 (Ill. 2004).
15. Barefoot v. Estelle, 463 U.S. 880 (1983).
16. Daniel Shuman, *Science, law, and mental health policy*, 29 OHIO N.U. L. REV. 587 (2003).

17. Johnson v. Cockrell, 306 F.3d 249 (5th Cir. 2002).

18. Logerquist v. McVey, 1 P.3d 113 (Az. 2000).

19. Coble v. State, 330 S.W. 3rd 253 (Tex. Crim. App. 2010).

20. *Id*.

21. Flores v. Johnson, 210 F.3rd 456 (5th Cir. 2000).

22. Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

23. Andrews v. State, 181 So. 3d 526, 528 (Fla. Dist. Ct. App. 2015).

24. Christopher Slobogin, *Dangerousness and Expertise Redux*, 56 EMORY L.J. 275, 295 (2006).

25. Melissa Hamilton, *Public safety, individual liberty, and suspect science: future dangerousness assessments and sex offender laws*, 83 TEMP. L. REV. 697 (2011).