OPINION EVIDENCE FROM EXPERTS: RECENT DEVELOPMENTS

Judge Stephen K. Bushong
Multnomah County Circuit Court
August 8, 2016

I. Expert Opinion Evidence--The Basics

A. Applicable rules

OEC 104(1)—"Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court[.]"

OEC 401—""Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

OEC 403—"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence."

OEC 702—"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."

B. Applying the rules

"To be admissible, expert testimony must be relevant under OEC 401, must assist the trier of fact under OEC 702, and must not be subject to exclusion under OEC 403 because its probative value is outweighed by the danger of unfair prejudice." *Blake v. Cell Tech International, Inc.,* 228 Or App 388 (2009). *See also Marcum v. Adventist Health System/West,* 345 Or 237, 243 (2008); *Jennings v. Baxter Healthcare Corp.,* 331 Or 285, 301 (2000) (same).

In applying these rules, "the court must identify and evaluate the probative value of the proffered scientific evidence, consider how that evidence might impair rather than help the trier of fact, and decide whether truthfinding is better served by admission or exclusion." *Blake,* 228 Or App at 400, quoting *State v. O'Key,* 321 Or 285,

299 (1995). "When ruling on the admissibility of scientific evidence, trial courts function as 'gatekeepers,' screening proffered evidence to determine whether it will legitimately assist the trier of fact." *Blake,* 228 Or App at 400, citing *O'Key,* 321 Or at 303.

A trial court's "gatekeeping role is important because of the persuasive power of scientific evidence[.]" *Blake*, 228 Or App at 400. "Evidence perceived by lay jurors to be scientific in nature possesses an unusually high degree of persuasive power. The function of the court is to ensure that the persuasive appeal is legitimate. The value of proffered expert scientific testimony critically depends on the scientific validity of the general propositions utilized by the expert." *O'Key,* 321 Or at 291.

The Oregon Supreme Court has identified several factors that should be considered in determining the admissibility of scientific evidence: "(1) The technique's general acceptance in the field; (2) The expert's qualifications and stature; (3) The use which has been made of the technique; (4) The potential rate of error; (5) The existence of specialized literature; (6) The novelty of the invention if one is involved; and (7) The extent to which the technique relies on the subjective interpretation of the expert." *Marcum*, 345 Or at 244, quoting *State v. Brown,* 297 Or 404, 417 (1984).

The court added eleven other considerations to that list: "(1) The potential error rate in using the technique; (2) The existence and maintenance of standards governing its use; (3) Presence of safeguards in the characteristics of the technique; (4) Analogy to other scientific techniques whose results are admissible; (5) The extent to which the technique has been accepted by scientists in the field involved; (6) The nature and breadth of the inference adduced; (7) The clarity and simplicity with which the technique can be described and its results explained; (8) The extent to which the basic data are verifiable by the court and jury; (9) The availability of other experts to test and evaluate the technique; (1) The probative significance of the evidence in the circumstances of the case; and (11) The care with which the technique was employed in the case." *Marcum,* 345 Or at 244-45 n 7, quoting *Brown*, 297 Or at 417-18 n 5.

II. Scientific and Nonscientific Expert Opinions

State v. Rambo, 250 Or App 186 (2012)

The issue in *Rambo* was whether "the trial court erred in admitting as nonscientific expert opinion evidence or, alternatively, as lay opinion evidence, a police officer's testimony that, in his opinion, defendant had driven her vehicle while under the influence of a narcotic analgesic." 250 Or App at 187. Prior case law had established that (1) the procedure and results of the 12-step Drug Recognition Evaluation (DRE)

protocol established by the National Highway Traffic Safety Administration (NHTSA) "are admissible as scientific evidence…to show that a defendant was under the influence of a controlled substance" (*Id.* at 191, citing *State v. Sampson,* 167 Or App 489, 512 (2000)); (2) "an incompletely administered DRE protocol is not admissible as scientific evidence" (*Id.,* citing *State v. Aman,* 194 Or App 463, 473 (2004)); and (3) "evidence of individual components of the DRE protocol were not necessarily inadmissible as nonscientific evidence of the impairment." *Id. Rambo* presented "the previously unexamined issue of whether a police officer's opinion that a defendant was under the influence of a controlled substance is admissible where it is based on a foundation that includes certain evidence that is encompassed in a DRE test, but where evidence of the DRE protocol itself is inadmissible because the protocol was not completed." *Id.* at 191-92.

The Court of Appeals concluded that "the trial court properly admitted the challenged testimony as nonscientific expert opinion evidence[.]" 250 Or App at 192. As a result, the court did "not consider whether it qualified for admission as lay opinion evidence." *Id.* The court explained that "[s]pecialized expert opinion evidence based on a witness's training and experience draws its force from that training and experience, but not necessarily from the mantle of science." *Id.* at 195. The testifying officer "did not—apart from his reference to independently admissible scientific tests—rely on the vocabulary of science, nor did he suggest that his conclusions had been reached through the application of a scientific method to collected data." *Id.* The trial court did not err in admitting the challenged evidence because the court "scrupulously sanitized the record of any evidence of a scientifically based protocol, thereby mitigating the risk that [the officer's] testimony would be given unfair weight beyond the credentials that he claimed." *Id.*

III. Required Expert Testimony—Standard of Care

Trees v. Ordonez, 250 Or App 229 (2012)

The defendant neurosurgeon in *Trees* performed surgery to fuse three vertebrae in plaintiff's neck. Plaintiff sued for medical malpractice when "she later suffered adverse medical consequences that required additional surgeries and left her with permanent disabilities." 250 Or App at 231. Plaintiff alleged that defendant "breached the standard of care by failing to properly place and secure the plate used to stabilize plaintiff's cervical spine, resulting in plaintiff's injuries." *Id.* Plaintiff's evidence at trial "included expert testimony from a biomechanical engineer about the function of the plate, opining that [defendant's] installation of the plate was inconsistent with the manufacturer's explicit instructions." *Id.* The trial court granted defendant's motion for directed verdict, concluding that plaintiff "had failed to provide expert testimony that

defendant violated the applicable standard of care." *Id.* The Court of Appeals affirmed. The court explained that the engineer's testimony "did not provide the jury with legally sufficient evidence of the care, skill, and diligence that was required of a reasonably careful practitioner when performing plaintiff's surgery under these circumstances." *Id.* at 237-38. Such testimony was required, the court explained, because without it, "the jury could not determine what the standard of care required in terms of using the plates under the complex medical circumstances presented here[.]" *Id.* at 240.

IV. Exclusion of Expert Opinion Evidence

A. Witness credibility/failure to assist the jury

State v. Southard, 347 Or 127 (2009)

The question in *Southard* was "whether a medical diagnosis of child sexual abuse is admissible scientific evidence." 347 Or at 129. The Supreme Court, applying the analysis adopted in *State v. O'Key*, 321 Or 285 (1995) and *State v. Brown*, 297 Or 404 (1984), first concluded that "the diagnosis possesses sufficient indicia of scientific validity to be admissible." *Id.* at 139. The court went on to hold that the evidence was not admissible under OEC 403 absent corroborating physical evidence because the criteria used to credit the victim's testimony "are essentially the same criteria that we expect juries to use every day in courts across this state to decide whether witnesses are credible." *Id.* at 140. As in *Brown,* (holding that polygraph evidence is inadmissible), the risk of prejudice was great because a diagnosis "based primarily on an assessment of the boy's credibility posed the risk that the jury will not make its own credibility determination, which it is fully capable of doing, but will instead defer to the expert's implicit conclusion that the victim's reports of abuse are credible." *Id.* at 141. Under those circumstances, "the degree to which the diagnosis advances the jury's ability to evaluate the evidence is minimal and…the risk that the jury will defer to the expert's assessment outweighs whatever probative value the diagnosis may have." *Id*. at 141-42.

B.A. v. Webb, 253 Or App 1 (2012)

The Court of Appeals held that *Southard* applies in a civil case alleging the tort of sexual battery of a child. The court could "discern no principled reason why the court's OEC 403 balancing analysis in that criminal case should obtain different results in this civil case." 253 Or App at 15. The court held that admission without objection of expert testimony of a diagnosis of child sex abuse absent physical evidence of abuse was a comment on the credibility of a witness constituting plain, and not harmless, error. "It is legally impermissible under Oregon law for a witness to comment on the credibility of another witness, and, in enforcing that principle, trial courts are obligated, *sua sponte*,

to exclude and, if necessary, strike testimony that comments on a witness's credibility." *Id.* at 12. Reversed and remanded for a new trial.

B. Scientific basis for causation

Marcum v. Adventist Health System/West, 345 Or 237 (2008)

In *Marcum*, the Supreme Court addressed the standards for admission of expert medical testimony in a medical malpractice case. Plaintiff experienced symptoms of pain, swelling and discoloration immediately after a chemical called "gadolinium" was injected into her hand. Plaintiff proffered testimony of a medical expert that "the gadolinium, instead of going into the vein, went into an area of the hand outside the vein, a circumstance called 'extravasation.'" 345 Or at 240. The trial court excluded the testimony because the expert "had failed to identify a scientifically valid cause of the injury—one that linked plaintiff's exposure to gadolinium to the vasospastic disorder that she experienced." *Id*. at 242. A divided Court of Appeals affirmed, but the Supreme Court reversed. The court noted that its prior cases on the trial court's "gatekeeper" role "provide limited guidance" because those cases "involved the admissibility of specific *techniques* or *tests*, the validity of which turned on scientific principles." *Id*. at 245 (emphasis in original). In contrast, "the issue [in *Marcum*] is the scientific basis for the causation testimony, rather than the scientific basis for a particular technique or method." *Id*. at 246. In many instances, the court noted, a medical expert cannot identify "with certainty" a single cause, but instead "a number of *potential* causes will be 'ruled in,' each of which has some percentage of likelihood of having caused plaintiff's condition[.]" *Id*. at 248 (emphasis in original). When "ruling in" a potential cause, "a trial court should insist that the causation theory be 'biologically plausible,' that is, that the exposure *could* have caused plaintiff's injury." *Id*. at 249 (emphasis in original). "[A] particular possible cause should not necessarily be excluded on the grounds that the expert cannot describe the precise mechanism of causation or point to statistical studies of cause and effect." *Id.* The court concluded that the jury should have been permitted to hear the expert opinion in this case because plaintiff "made an adequate showing of a scientifically valid basis for 'ruling in' gadolinium as a potential cause of her symptoms as well as for 'ruling out' a number of the other possible causes of her injury." *Id*. at 252-53.

C. Scientific validity

Kennedy v. Eden Advanced Pest Technologies, 222 Or App 431 (2008)

The plaintiff in *Kennedy* hired defendants to apply non-toxic pesticides to his property after he saw carpenter ants in his yard. Plaintiff experienced nausea and sleeplessness after the pesticides were applied. Plaintiff later discovered that

defendants applied toxic chemicals after they ran out of the non-toxic product. Plaintiff sued, alleging fraud, negligence, trespass and other claims. At trial, plaintiff proffered the testimony of Dr. William Rea, who diagnosed plaintiff with "chemical sensitivity" and related conditions, and concluded that exposure to defendant's pesticides exacerbated those conditions. The trial court excluded Dr. Rea's testimony, concluding that it did not qualify for admissibility under *State v. O'Key*, 321 Or 285 (1995). The court noted that the American Medical Association (AMA) and other professional organizations do not recognize "chemical sensitivity" as a valid medical diagnosis, and virtually every court that previously addressed the issue refused to allow Dr. Rea and his associates testify as experts on "chemical sensitivity." 222 Or App at 450-51. The Court of Appeals reversed. The court first noted that, when all the evidence was considered, "the most that can be said is that there is a controversy in the medical community about whether chemical sensitivity…is a valid diagnosis." *Id*. at 447. The court concluded that, "the competing views between the two schools of scientific thought did not authorize the trial court in its gatekeeping function to exclude plaintiff's evidence…because each school of thought reaches a conclusion that is 'biologically plausible[.]'" *Id*. at 450 (citing *Marcum v. Adventist Health System/West*, 345 Or 237, 248-49 (2008).

The fact that no other court had allowed expert testimony on "chemical sensitivity" did not matter, the court explained, because under Oregon law, "the proper inquiry is not whether…chemical sensitivity is a "valid" diagnosis or is recognized by other jurisdictions; rather, we must, on the record in this case, 'decide whether truthfinding is better served by admission or exclusion.'" *Id*. at 451 (quoting *O'Key*, 321 Or at 299). The court stated that, regardless of what other courts have done, it has "an obligation to independently construe the relevant provisions of the Oregon Evidence Code." *Id*. The court noted "the Oregon legislature's strong policy to aid the trier of fact to understand the evidence presented at trial in the context of the parties' theory of the case" and concluded that "the legislature intended controversial evidence like Rea's testimony to be presented to the jury." *Id*. at 451-52. "In Oregon, we trust juries to be able to find the truth in the classic 'battle of the experts.'" *Id.* at 452.

Blake v. Cell Tech International, Inc., 228 Or App 388 (2009)

The plaintiff in *Blake* brought a wrongful death action against companies that manufacture and distribute a dietary supplement called Blue Green Algae. Plaintiff alleged that decedent consumed the dietary supplement, which "contained toxins called 'microsystins,' and those microcystins caused decedent's liver and renal (kidney) failure," resulting in her death at the age of 34. 228 Or App at 390. Plaintiff called an expert witness, Dr. Dietrich, to testify "regarding the immunohistochemical (IHC) tests he performed to detect microcystin toxins in decedent's liver and kidneys." The trial

court excluded Dietrich's testimony, concluding that it lacked scientific validity. The Court of Appeals affirmed, citing several factors: (1) "plaintiff failed to demonstrate that IHC testing is generally accepted for the purpose of testing for microcystins in human liver tissue" (*Id*. at 401); (2) "there is no known error rate in the tests performed by Dietrich" and each set of tests "produced at least one false result" (*Id*. at 401-02); (3) "there are no peer-reviewed publications regarding IHC testing of human liver tissues for microcystins by which the accuracy of Dietrich's tests can be assessed, nor are there any established standards identifying specific antibodies and dilution ratios for those tests" (*Id*. at 402); and (4) "the probative significance of the evidence in the circumstances of the case—that decedent died from microcystin poisoning—is central to plaintiff's claim, and Dietrich's testimony, if admissible, could be highly persuasive to a jury." *Id*. Under those circumstances, the court concluded, "the trial court, in the exercise of its gatekeeping function, did not err as a matter of law in excluding Dietrich's testimony." *Id*.

D. Qualifications of Expert

Durette v. Virgil, 272 Or App 545 (2015)
Thoens v. Safeco Ins. Co. of Oregon, 272 Or App 512 (2015).

In *Durette* and *Thoens*, the Court of Appeals addressed the admissibility of an expert witness's testimony in a personal injury case. The expert opined—based on his analysis of photographs and repair estimates of vehicles involved in the collision—that the collision could not have produced the forces necessary to cause the plaintiffs' claimed injuries. In *Thoens,* the court held that the type of biomechanical or biomedical analysis undertaken by the witness is scientifically valid for purposes of OEC 702. The court rejected plaintiff's argument that the witness was not qualified to give expert testimony on an issue of "medical causation." The court concluded that the witness was qualified "to calculate and testify to the impact speed in the collision, the forces transmitted to plaintiff in her car in the collision, the forces plaintiff's body experienced in her daily activities before the collision, and the forces generally tolerated by human joints and tissues without injury as reflected in the literature in his field." 272 Or App in 544. In *Durette,* the court applied *Thoens* and further held that the testimony was relevant under OEC 401, and that the court did not err in declining to exclude the testimony under OEC 403 because "plaintiff did not establish that the probative value of [the] testimony was substantially outweighed by undue prejudice." 272 Or App at 564.

V. Expert Testimony in Juvenile Cases

A. Sufficiency of Evidence

Dept. of Human Services v. M.E., 255 Or App 296 (2013)

The juvenile court exercised jurisdiction over twin 13-year-old girls, concluding that the children were at risk of harm sufficient to warrant juvenile court jurisdiction under ORS 419B.100(1)(c) because (1) mother's current husband (the girls stepfather) had sexually abused one of the girls on one occasion four years earlier; and (2) mother did not believe that the incident occurred. The Court of Appeals, exercising its discretion under ORS 19.415(3)(b) to review the facts *de novo,* concluded that the twin girls were not at risk of harm sufficient to warrant juvenile court jurisdiction. The court relied heavily on expert testimony from Dr. Frank Colistro, at that time a forensic/investigative psychologist and certified clinical sexual offender therapist. Colistro performed a psychological evaluation and psychosexual risk assessment of the stepfather, and concluded that the stepfather had a "social anxiety disorder" and did not pose "any significant threat for committing a person-to-person crime in general or a sex crime in particular." 255 Or App at 302 (quoting Colistro report). The court further relied on expert testimony from Dr. Zorich, a psychologist who conducted a psychological evaluation of mother, and "opined that mother was capable of being protective even if she did not believe that the abuse had occurred." *Id.* at 312. Under the totality of the circumstances, the court was "not persuaded that the evidence is sufficient to establish, by a preponderance of the evidence, that stepfather's four-year-old abuse of MI and mother's denial of that abuse present a current risk of harm to MI and MA." *Id.*

Dept. of Human Services v. S.D.I., 259 Or App 116 (2013)

The juvenile court exercised jurisdiction over the child based on mother's absence from the child's live for several years and the risk that the child would be psychologically damaged if she were immediately transferred to mother's custody without a transition process. On appeal, mother contended that court erred in receiving "expert" testimony from the DHS caseworker regarding the risk of psychological damage, arguing that the caseworker was not qualified to offer that opinion. The Court of Appeals "assume[d], without deciding, that the juvenile court did not err in admitting the caseworker's testimony[.]" 259 Or App at 121. The court nevertheless reversed, concluding that "there is insufficient evidence of the type, degree, and duration of any psychological damage that A might suffer if mother immediately took custody of her

without a transition managed by DHS to demonstrate that such a transfer would endanger A as required by ORS 419.100(1)(c)." *Id.* at 123.

Dept. of Human Services v. M.H., 256 Or App 306 (2013)

The juvenile court exercised jurisdiction over the child based on findings that child is at risk of serious harm due to her father's sexual abuse of two children when he was a teenager; both parents' failure to engage in services; father's unwillingness or inability to protect child from abuse or neglect by mother; and the parents' living conditions, unemployment, and lifestyle created a risk of harm to the child. The Court of Appeals affirmed the exercise of juvenile court jurisdiction but remanded to enter a new jurisdictional judgment omitting findings based on parents' living conditions, unemployment, or lifestyle. Three psychologists offered somewhat different opinions regarding the risks posed by father's prior sex offenses and his failure to complete sex-offender treatment. The Court of Appeals declined to conduct a *de novo* review of the record because the juvenile court's "findings concerning the risk of father reoffending are consistent and are supported by evidence[.]" 256 Or App at 328 n 8. In reviewing the evidentiary record "to determine whether any evidence, and the inferences that reasonably can be drawn from the evidence, supports the juvenile court's findings[,]" (*Id.* at 327), the court explained that it is "bound by the juvenile court's implicit finding that psychological evidence was persuasive." *Id.* at 328. The court concluded that one psychologist's testimony "itself is sufficient to support the court's finding that father's earlier offenses placed V at risk of serious harm." *Id.*

B. Reliance on the Court's Own "Expertise"

Dept. of Human Services v. J.R.L., 256 Or App 437 (2013)

The juvenile court exercised jurisdiction over the child based on mother's admissions relating to exposing the child to risks of sexual abuse by father, a lack of suitable housing, and a failure to meet the child's educational needs. The court then denied mother's motion to dismiss jurisdiction and wardship over the child, and approved a change in the child's plan from reunification to adoption. On appeal, mother argued that the court had erred by improperly relying on mother's mental health problem, which was not a basis for jurisdiction. The Court of Appeals agreed, concluding that it was apparent from the juvenile court's explanation of its decision and its findings that "mother's mental health and failure to consistently engage in mental health treatment" was a significant factor in the court's decisions. 256 Or App at 448. That defect was not cured by periodic reports to the court indicating that mother still needed to address her depression and anxiety issues. The Court of Appeals reversed

and remanded for the court to reconsider its rulings "without reliance on those extrinsic facts." *Id.* at 452.

Dept. of Human Services v. A.R.S., 256 Or App 653 (2013)

In this juvenile dependency case, mother and child appealed a permanency judgment that denied their motions to dismiss jurisdiction over the child and continued the plan of returning the child to father's care. The juvenile court determined that mother had not made sufficient progress to enable the child to safely return to her care. The Court of Appeals reversed and remanded. The court concluded that the juvenile court "erred in relying on a circumstance—specifically, mother's alleged personality disorder—that was not pleaded or proved as a basis for dependency jurisdiction[.]" 256 Or App at 655. The court explained that, if, as the juvenile court concluded, "mother indeed suffers from an underlying personality disorder that is the 'barrier' preventing her from reunification with child, mother is entitled to notice—and an opportunity to address—that condition." *Id.* at 664.

C. The Latest Word from the Supreme Court

State v. J.C.N.-V, 359 Or 559 (2016)

The state petitioned to waive juvenile court jurisdiction under ORS 419C.349 and ORS 419C.352 so youth could be tried as an adult on aggravated murder and other felony charges. Under the statutes, a youth under the age of 15 who is alleged to have committed murder may be waived into adult court only if, at the time of the conduct, the youth "was of sufficient sophistication and maturity to appreciate the nature and quality of the conduct involved." Here, the juvenile court found that this standard was satisfied "based on evidence suggesting that youth was of 'average' sophistication and maturity for his age and was 'just as effective' as peers of his age in understanding that his conduct was wrong[.]" 359 Or at 562. The Supreme Court reversed, concluding that "the 'sophistication and maturity' requirement is more demanding." *Id.* The court concluded, after examining the text, context and legislative history of the statutes, that the statutory requirement "is not equivalent to a requirement that a youth have criminal capacity." *Id.* at 597. To authorize waiver, "a juvenile court must find that the youth possesses sufficient adult-like intellectual, social and emotional capabilities to have an adult-like understanding of the significance of his or her conduct, including its wrongfulness and its consequences for the youth, the victim, and others." *Id*.

In making that determination, "a juvenile court will be called on to consider its own knowledge and assessment of the capabilities of typical adults and the capabilities

of the particular youth who is subject to wavier and any evidence on that subject that the parties may offer, such as the evidence that the juvenile court in this case considered. With regard to the capabilities of typical adults, a court could, for instance, consider its own understanding and evidence that the parties might offer indicating that adults have an ability to 'measure and foresee consequences' and are significantly better than adolescents at accurately perceiving and weighing risks and benefits." *Id.* at 598 (citations omitted).

The court cited those types of considerations and evidence as illustrative of the type of things that "a juvenile court may find helpful in deciding what constitutes an adult-like capacity to 'appreciate,' or comprehend, with heightened understanding and judgment, an act's consequences and wrongfulness." *Id.* After making that determination, the court "must then determine whether the particular youth's capabilities are sufficiently similar to those of a typical adult that the court can conclude that the youth has the requisite appreciation of the nature and quality of the conduct involved. That determination will again require the court to consider its own assessment of the particular youth's capabilities, including evidence . . . of the actions in which the youth engaged and the youth's history." *Id.* at 598-99. The juvenile court may reach a conclusion about the youth's capabilities "from inferences that the court draws from that evidence and from any expert testimony that the parties may offer. Such evidence will necessarily be multi-faceted; there is no one capability that a youth must have to demonstrate that the youth meets the requisite standard. Instead, a court may well have to compile and balance competing evidence relating to a youth's capabilities." *Id.* at 599. The legislature's intention, the court concluded, was "to have a trial court determine, from the evidence presented, whether the youth in question has sufficient adult-like mental, social and emotional capabilities to appreciate the relevant conduct, its consequences and criminality." *Id.*