

ARKANSAS COURT OF APPEALS

DIVISION III

No. CA11-876

DERRY BERRIGAN & COMPANY ET
AL.

APPELLANTS

V.

KBS LEASING, INC.

APPELLEE

Opinion Delivered March 27, 2013

APPEALED FROM THE BENTON
COUNTY CIRCUIT COURT
[NO. CV-05-712-6]HONORABLE R. DOUGLAS
SCHRANTZ, JUDGE

AFFIRMED

JOHN MAUZY PITTMAN, Judge

Derry Berrigan and Company and Don's Home Theaters and Computers, divisions of DonSystems, Inc., and the principals of the firms, Derry Berrigan and Don Berrigan, (collectively, Berrigan), appeal from a judgment entered in favor of appellee KBS Leasing, Inc., in the total amount of \$1,320,004, together with costs and attorney's fees.¹ For reversal, Berrigan raises one issue contesting an evidentiary ruling made by the circuit court. Finding no error, we affirm.

In June 2004, Berrigan contracted to design and install a whole-office control system for dentist Kurt Solera and his company, KBS, using technology and components from a company named Crestron. Berrigan also contracted to design a Lutron lighting system.

¹Separate judgments were entered against Derry and Don Berrigan individually in the amount of \$660,000 each.

A dispute arose in December 2004, when a KBS representative indicated that it would not pay for the work. Berrigan filed suit in April 2005, asserting that KBS refused to pay the full amount of its invoices in the sum of \$125,397.16. The circuit court ultimately granted summary judgment in favor of KBS on Berrigan's claims, finding that those claims were barred because Berrigan did not have a contractor's license.

KBS also filed a counterclaim against the Berrigans individually for breach of contract, fraud, and unfair trade practices. Berrigan answered, denying KBS's claims. KBS amended its counterclaim to add DonSystems, Inc., as a defendant. The circuit court struck Berrigan's answer to KBS's counterclaim for Berrigan's failure to comply with an order compelling discovery, leaving KBS's damages as the only issue remaining.

A three-day jury trial was held on damages in April 2011. At trial, counsel for Berrigan objected to the testimony of KBS's expert, Ernesto Lopez, Jr., as to the damage calculation for the Crestron and Lutron systems. On voir dire, Lopez admitted that he adopted and relied on information from Doug Schriver, a sales representative, as the sole basis for his testimony that it would cost approximately \$124,000 to repair the systems, together with another \$30,000 for testing and additional charges. Lopez further testified that, as a contractor, he would commonly have to rely on the expertise of specialists to provide estimates of costs or repairs. Lopez testified that he had worked on projects with similar Crestron and Lutron systems. The court allowed Lopez to render his opinion as to the cost of repairs because it was based on an estimate of another expert on whom Lopez would routinely rely in similar

circumstances. Lopez testified that the total cost for all repairs at KBS's office was approximately \$200,000.

Berrigan moved for directed verdict at the close of KBS's case. In its motion, Berrigan argued that Lopez's opinion did not explain his methodology and was nothing more than the wholesale adoption of Schriver's information. Although Berrigan noted that an expert could rely on hearsay in some circumstances, it argued that the expert must have some skill, knowledge, or training within that field to render an expert opinion. According to Berrigan, it was improper for Lopez to merely adopt Schriver's information. The circuit court denied the motion for directed verdict, finding that Lopez was qualified as an expert. The court found that Lopez's opinion was based on the things that experts typically rely on—their education, training, work experience, and standards used in the industry. Berrigan renewed its motion at the close of all testimony and adopted the previous arguments. The court again overruled the motion.

The case was submitted to the jury on interrogatories. The jury awarded KBS damages against DonSystems, Inc., of \$1 for fraud; \$1 for violation of the Deceptive Trade Practices Act; \$1 for breach of contract; and \$1 in punitive damages. The jury made separate damage awards of \$100,000 for fraud; \$35,000 for violation of the Deceptive Trade Practices Act; \$35,000 for breach of contract; and \$490,000 in punitive damages against both Derry and Don Berrigan. Judgment was entered on May 9, 2011. The court made it clear that separate judgments were being entered against the Berrigans individually. The court also awarded KBS additional attorney's fees of \$25,000. This appeal followed.

For reversal, Berrigan argues that the circuit court erred in allowing Ernesto Lopez, Jr., to testify as to the cost of repairs to the Crestron and Lutron systems over its objection. It argues that Lopez improperly based his opinion on the hearsay opinion of Doug Schriver, a sales representative for Crestron and Lutron products.

Berrigan, citing several federal cases, urges this court to apply a *de novo* standard of review. Our supreme court has not adopted such a standard. Instead, our case law provides that we review the admission of expert testimony under an abuse-of-discretion standard. *Crowell v. Barker*, 369 Ark. 428, 255 S.W.3d 858 (2007). In discussing our standard of review for evidentiary rulings, it has been said that circuit courts have broad discretion and that a circuit court's ruling on the admissibility of evidence will not be reversed absent an abuse of that discretion. *Advanced Environmental Recycling Technologies, Inc. v. Advanced Control Solutions, Inc.*, 372 Ark. 286, 275 S.W.3d 162 (2008).

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court held that the admissibility of scientific evidence was to be determined in accordance with the Federal Rules of Evidence, in particular Rule 702, which requires a trial court to be a "gatekeeper," allowing expert testimony only if it is relevant and reliable. 509 U.S. 579, 597 (1993). Arkansas Rule of Evidence 702² provides:

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.

²Arkansas and Federal Rule 702 are substantially similar.

In *Daubert*, the Supreme Court listed several factors upon which a trial court could rely in determining the reliability of an expert's testimony. 509 U.S. at 592–93. In *Farm Bureau Mutual Insurance Co. v. Foote*, 341 Ark. 105, 14 S.W.3d 512 (2000), the Arkansas Supreme Court adopted the holding in *Daubert*. Although the *Daubert* gatekeeping function applies to all expert testimony, whether the factors articulated in that case are, or are not, reasonable measures of reliability in a particular case is for the circuit court to determine, and the court's decision will not be reversed absent an abuse of discretion. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *see also Coca-Cola Bottling Co. v. Gill*, 352 Ark. 240, 100 S.W.3d 715 (2003).

Rule 703 provides that the facts or data relied on by an expert need not be admissible in evidence if they constitute facts or data reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject. “The test stated in [Rule 703] is whether the expert's reliance is reasonable.” *Dixon v. Ledbetter*, 262 Ark. 758, 762, 561 S.W.2d 294, 296 (1978). Berrigan argues that, in the present case, the circuit court did not rule on whether it was reasonable for Lopez to rely on Schriver's information. However, such a ruling is implicit in the circuit court's ruling permitting Lopez to testify because if such reliance were not reasonable, Lopez would not have been allowed to testify on the point.

Although predating *Daubert*, the reasoning in *Dixon* is directly on point. There, a homeowner sued a contractor for structural defects to a house. The trial court allowed the plaintiff's expert to testify on the cost of repairs based on estimates obtained from a supplier. The supreme court affirmed, stating:

The test stated in the rule is whether the expert's reliance is reasonable. It was not *prima facie* unreasonable for the expert witness in this case to ascertain the cost of

the required pieces of sheet metal by consulting a supplier. As Field [Richard H. Field, *A Code of Evidence For Arkansas?*, 29 Ark. L. Rev. 1 (1975)] points out, the same cost figure could have been shown by calling the supplier as a witness. That cumbersome procedure is now readily avoidable; for the expert witness can be cross-examined about his expertise in the matter and about the reasonableness of a supplier's estimate. No such inquiry was made on cross-examination; so no error appears.

262 Ark. at 762, 561 S.W.2d at 296. Here, Lopez testified that, as a contractor, he would commonly have to rely on the expertise of others to provide estimates for costs of repairs. Berrigan complains that Lopez did not have much knowledge or experience with the Crestron and Lutron systems and had no knowledge how Doug Schriver arrived at his cost figures. Berrigan also complains about a lack of specifications for the elements of the Crestron and Lutron systems. However, these matters were subject to cross-examination. *Dixon, supra*.

The Supreme Court has made it clear that, contrary to Berrigan's argument, the *Daubert* factors may not be pertinent in addressing the reliability of an expert's opinion, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. *Kumho Tire*, 526 U.S. at 149–52. In this case, it was not necessary for the circuit court to determine the admissibility of Lopez's testimony under the specific factors set out in *Daubert* because his testimony did not raise any novel scientific evidence, theory, or methodology. Lopez's testimony was based on his personal observation of the KBS office and its defects, his experience as a contractor, and Schriver's information. Berrigan conceded that Lopez was well qualified as a general contractor. Expert testimony may be given by individuals qualified by experience, knowledge, or training, and they need not be licensed professionals. *John H. Parker Construction Co. v. Aldridge*, 312 Ark. 69, 847 S.W.2d 687 (1993).

We cannot say that the circuit court abused its discretion in allowing Lopez to testify. While the circuit court did not use the specific factors set forth in *Daubert*, it took reasonable measures to evaluate the reliability and relevance of Lopez's testimony before allowing it. The court initially sustained the objection, noting that Lopez had not yet testified whether this was the type of estimate normally relied upon by an individual in his position. Under continued questioning by Berrigan, Lopez then supplied the missing element and the circuit court allowed him to state his opinion as to the cost of repairs. Thus, the circuit court properly performed its duty as a "gatekeeper."

Affirmed.

GLOVER and WOOD, JJ., agree.

Shemin Law Firm, PLLC, by: *Kenneth R. Shemin*; and
Cullen & Co., PLLC, by: *Tim J. Cullen*, for appellants.

Cox, Cox & Estes, PLLC, by: *S. Lance Cox*, for appellee.