EXHIBIT 11

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United States District Court,
C.D. California.
Thomas A. MORIN, Plaintiff,
v.
McCULLOCH CORP. et al., Defendants.
No. CV 01-6431 SVW (SHx).

July 3, 2002.

Named Expert: Arvin Hille, Robert Kadlec, John Jones

David S. Blau, Hahn & Bolson, Los Angeles, CA, Jeffrey T. Bolson, Hahn & Bolson, LLP, Torrance, CA, for Plaintiff.

Craig F. Sears, Harrington Foxx Dubrow & Canter, Peter A. Dubrawski, Haight Brown & Bonesteel, Los Angeles, CA, for Defendants.

ORDER PROVIDING FURTHER DETAIL ON PRETRIAL ORDERS GRANTING PLAINTIFF'S MOTION *IN LIMINE* TO EXCLUDE EXPERT WITNESS TESTIMONY OF ROBERT KADLEC; GRANTING PLAINTIFF'S MOTION *IN LIMINE* TO PRECLUDE EXPERT TESTIMONY FROM ARVIN HILLE REGARDING THE CHAIN BRAKE; AND GRANTING DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY OF JOHN JONES

STEPHEN V. WILSON, District Judge.

I. Introduction.

***1** The plaintiff sought recovery under multiple theories of strict and negligent products liability, including various design defects and failures to warn. The Court pre-tried the case on March 4, 5, and 6 of 2002, and again on April 17, 2002. The Court tried the case to a jury on April 23 to 26, 2002. The jury found for the defendants. On special interrogatories the jury expressly found against the plaintiff on all theories of design defect.

The parties filed motions *in limine* to exclude the testimony of John Jones, the plaintiff's expert; to exclude the testimony of Robert Kadlec, the defendant Sears' expert; and to preclude the defendant Blount's expert Arvin Hille from testifying on the accused chainsaw's chain brake. The Court granted each of these three motions. This Order further explains the rationale for the rulings, beyond the explanation provided in the hearing transcripts.

II. Analysis.

A. Admissibility of expert testimony.

1. Testing reliability under Rules 702 and 104(a).

Rule 702 of the Federal Rules of Evidence ("FRE") in part codifies the Court's role as a gatekeeper in passing on the admissibility of expert testimony. Rule 702 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, 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.

Fed.R.Evid. Rule 702 (West 2002); *also id.*, Note to 2000 Amendment. FN1,FN2

FN1. The Judicial Conference amended Rule 702 in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993),

> and to the many cases applying *Daubert*, including *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999). *See* Notes to 2000 Amendment, FRE Rule 702.
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> FN2. Stating that "The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with *Kumho*, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful.

The admissibility of all expert testimony is governed by the principles of Rule 104(a). *See* Fed.R.Evid. Rule 702 Notes to 2000 Amendment ("[T]he admissibility of all expert testimony is governed by the principles of Rule 104(a)."); Fed.R.Evid. Rule 104(a). Rule 104(a) states:

Preliminary questions concerning the qualification of a person to be a witness ... or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it [the court] is not bound by the rules of evidence except those with respect to privileges.

Fed.R.Evid. Rule 104(a). Under Rule 104(a), the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bouriaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).

2. Rule 702 does not provide an exclusive list of reliability criteria.

The new Rule 702 does not codify the *Daubert* factors for testing the reliability of proffered testimony. *See id.*, Note to 2000 Amendment ("No attempt has been made to 'codify' these specific factors.... [listing plurality of factors used after *Daubert* to test reliability] ... All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. *See Kumho*, 119 S.Ct. at 1176 ('[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.').") FN3

> FN3. The Note continues
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> > Daubert itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific Daubert factors can apply to every type of expert testimony. In addition to *Kumho*, 526 U.S. at 151, 119 S.Ct. at 1175, *see Tyus v. Urban Search Management*, 102 F.3d 256 (7th Cir.1996) (noting that the factors mentioned by the Court in Daubert do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc.*, 128 F.3d 802, 809 (3d Cir.1997) (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific *Daubert* factors where appropriate.
> >
> > *Id.*

***2** The Court has broad discretion in discharging its gatekeeping function. *See Kumho Tire*, 526 U.S. at 141-42, 119 S.Ct. at 1176; *United States v. Mendoza-Paz*, 286 F.3d 1104, 1112 (9th Cir.2002); *United States v. Hankey*, 203 F.3d 1160, 1168 (9th Cir.2000).

3. Relevant criteria for testing reliability of ex-

pert testimony.

Daubert itself set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested-that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and 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. *See Daubert,* 509 U.S. at 594 . The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." *See Kumho,* 526 U.S. at 151, 119 S.Ct. at 1175.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include: (1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1317 (9th Cir.1995); (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion, *see General Elec. Co. v. Joiner,* 522 U.S. 136, 146, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered"); (3) Whether the expert has adequately accounted for obvious alternative explanations, *see Claar v. Burlington N.R.R.,* 29 F.3d 499 (9th Cir.1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition), *compare Ambrosini v. Labarraque,* 101 F.3d 129 (D.C.Cir.1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert); (4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting," *Sheehan v. Daily Racing Form, Inc.,* 104 F.3d 940, 942 (7th Cir.1997); *see Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 151, 119 S.Ct. 1167, 1176, 143 L.Ed.2d 238 (1999) (*Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field"),(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give, *see Kumho Tire Co. v. Carmichael,* 526 U.S. at 151, 119 S.Ct. at 1175 (*Daubert* 's general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."); *Moore v. Ashland Chemical, Inc.,* 151 F.3d 269 (5th Cir.1998) (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiff's respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp.,* 855 F.2d 1188 (6th Cir.1988) (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

***3** No single factor is necessarily dispositive of the reliability of a particular expert's testimony. *See, e.g., Heller v. Shaw Industries, Inc.,* 167 F.3d 146, 155 (3d Cir.1999) ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."); *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 43 F.3d 1311, 1317, n. 5 (9th Cir.1995) (noting that

some expert disciplines “have the courtroom as a principal theatre of operations” and as to these disciplines “the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.”).

B. Application.

1. John Jones.

Sears and Blount filed a motion *in limine* seeking to exclude testimony from the plaintiff's expert, John Jones (“Jones”). The gravamen of the challenge was not the substance of Jones' testimony, but his foundation as an expert. FN4 The plaintiff represented that he intended to call Jones to testify: 1) on the feasibility of alternative chainsaw and replacement chain and bar designs; 2) the relative weight of the risks to the chainsaw consumer in the current state of the accused products as against the (diminished) utility to the chainsaw consumer inherent in each suggested alternative design; and 3) the inadequacy of the warnings provided on the chainsaw, the replacement chain, and particularly the replacement chain packaging.

> FN4. The Court considered testimony in which Jones applied several texts on warning label design to evaluate the warning labels on the accused products. The defendants disputed Jones' interpretation of the applicability of disparate ANSI standards relating to warning labels in general (ANSI Z535.4-1991) and warning labels specific to chainsaws (ANSI B175.1-1991). Were Jones qualified as an expert and opined that these texts were authoritative, the plaintiff could have offered such testimony at trial. As the Court found that Jones was not qualified as an expert in this field, the plaintiff was unable to introduce the texts or learned treatises through Jones at trial. The plaintiff did not attempt to introduce the texts through Arvin Hille, Blount's expert and the only expert who testified at trial. The plaintiff did not seek to qualify any other expert who might have provided a foundation for introduction of these texts.

Jones' testimony was unnecessary to establish the feasibility of alternative designs proposed by the plaintiff. The plaintiff could and did establish the feasibility of requiring a tip guard, and varying the gauge of the drive component and cutting chain so as to render professional chain incompatible with a device rated for safety chain, through Bount's expert Arvin Hille.

The real substance of Jones' proffered testimony was his evaluation of the warning labels on the products. The Court and parties conducted an extensive *voir dire* of Jones at the pre-trial conference for purposes of exploring his qualifications as an expert in the design and evaluation of warning labels on consumer power tools. During this proceeding the Court directed the parties to identify every instance in Jones' deposition testimony and on his curriculum vitae in which Jones reported prior experience in the design or evaluation of warning labels for consumer power tools.

Jones lacked the experience to qualify as an expert in warning label design or evaluation for consumer power tools; or to opine as an expert on the relative weights of the current product risks as against the diminished utility of the product incorporating the proposed design changes.

a. Jones is not an expert in warning design.

There is no question that Jones “designed” warning labels at various points in his career. That does not, by itself, qualify Jones as an expert in the design and evaluation of warning 27 labels .FN5 None of Jones' experience, taken individually or in the aggregate, qualifies Jones as an expert in warning labels for this action. At the pre-trial hearing Jones testified that he designed warning labels 1) in the 1960s as part of package design for a pharmaceutical product for sale to medical personnel while

working for Johnson & Johnson; 2) for placement on industrial lathes on the floor of his wood shop when he owned a woodworking business; and 3) for the packaging of a consumer smoke detector. Jones claims that he gathered or surmised a methodology for designing the warning on the pharmaceutical product as a matter of 'general engineering principles.'

> FN5. Jones holds a Bachelor's of Science in mechanical engineering, is licensed as a professional engineer, and has worked as a 'forensic engineer' in his current capacity as a litigation consultant. Jones reports that he has testified as an expert in twelve (12) trials and offered a deposition as an expert in nineteen (19) actions. Jones is not an industrial engineer, and was not qualified as an expert in warning label design for consumer power tools in these proceedings.

***4** Jones states that in the 1960s there was not yet an established methodology for designing and testing the effectiveness of warning labels-a process later codified in the texts upon which Jones sought to rely in relation to evaluating the warnings on the accused products.[FN6] The sutures wrapped in the package designed by Jones for Johnson & Johnson were not power tools, and did not involve the same concerns or risks requiring communication to the consumer. Jones did not describe any clear method by which he evaluated whether the labels he 'designed' effectively communicated their message to the intended audience, nor what methods-if any-were used to identify the intended audience.[FN7] This on-the-job experience does not qualify Jones as an expert in warning design and evaluation for the accused products in this case.

> FN6. If this statement is accurate, then Jones admits that this experience did not apply what is now established methodology or teaching in warning design-although Jones may have followed parallel procedures. Jones does not represent that he did follow currently accepted methodology. If the statement is inaccurate, then it further supports the conclusion that Jones is not qualified as an expert in warning design.

> FN7. Jones testified that the sutures were sold primarily through medical supply retailers to medical professionals.

Jones next described designing a warning label for a consumer smoke detector package, which advised the consumer to replace the battery periodically and to dispose of the battery properly. As with the sutures, the audience and concerns applicable to the label were different in kind from those at issue in the accused products. The difference in concerns between the effectiveness of this warning and the substance of the warning for the accused products is underscored by the fact that ANSI provides a distinct warning standard specifically addressed to chainsaws. The Court finds that this experience does not qualify Jones as an expert in warning design. As with the sutures package, Jones described no methodology by which he or his team evaluated the effectiveness of the label, or tested alternative formulations.

Jones described designing and implementing warnings for the fixed power tools, including a lathe, on the floor of his woodworking company's shop. The warnings were provided for his employees, who were professional woodworkers or carpenters. This, too, is dissimilar to the warnings at issue in the accused products. The audience for the shop tool warnings were professionals, trained in part by Jones. Even if Jones evaluated the workers for receptiveness to the warnings, a matter on which he did not testify, it would be difficult to disentangle the role of the warning labels from the impact of Jones' training or shop operating procedures, or the skill level of the workers from the efficacy and attention-getting qualities of the warnings. This practical experience falls short of qualifying Jones as an expert in warning design under ANSI standards for consumers and chainsaws.

Finally the Court considers Jones' experience as a 'forensic engineer.' In that capacity Jones evaluated designs and warning labels including: 1) an operator safety warning on a jet ski; 2) warnings on a power angle polisher; and 3) warnings and design for a battery operated carving knife. Jones developed an opinion on each for trial. The closest experience was the jet ski warning, where Jones concluded that, in rough terms, one of several admonishments was improperly buried in the list on the warning label / operating instructions thereby diluting its effectiveness. As before, this experience is dissimilar. The accused products implicate a single relevant warning, according to a specific ANSI standard for chainsaws. His prior testimony as an expert witness does not qualify Jones as an expert in designing warning labels in this action.

***5** None of this experience qualified Jones as an expert on warning labels for this action.

b. Jones is not an expert in chainsaw design.

Similarly Jones was not qualified as an expert in chainsaw design. Jones testified to consumer experience with chainsaws. He never designed a chainsaw, cutting chain or bar. Jones never tested chainsaws or cutting chains for kickback, nor designed mechanisms to dampen kickback. He never studied the occupational or operational risk of kickback injury across a representative population. In short, Jones was not qualified to testify as to the design flaws alleged in the accused products, nor the risk or utility associated with current or alternative designs.

2. Robert Kadlec.

The plaintiff filed a motion *in limine* to exclude expert testimony from Sears' expert, Robert Kadlec ("Kadlec").[FN8] Sears intended to offer Kadlec in order to establish that the accused chainsaw was properly designed. In particular, Sears intended to offer testimony relating to a conceptual analysis by Kadlec as evidence that the chainsaw was safely designed to deal with kickback. This testimony fails the reliability analysis of Rule 702 and *Daubert.*

> FN8. Kadlec holds a doctorate in aeronautics, astronautics and physics from Stanford, as well as a bachelor's in mechanical engineering from Minnesota. He is a professional engineer, and now works as a consultant for litigation.

Kadlec, like Jones, never designed chainsaws or cutting chains, or tested chainsaws or chains for kickback. His personal experience with chainsaws consisted of clearing brush on private land in Montana. Although there is an established analytical methodology in ANSI for estimating the force of nose bar kickback across various chainsaw power heads and cutting chain combinations, Kadlec analyzed the accident in this case using a freebody diagram and Newtonian physics. Kadlec assumed that the kickback was a "pinch type" rather than a nose-bar event. He based his opinion on factual assumptions (stance of the plaintiff while cutting, the method of cutting, the geometric measurements of the log, and so on) lacking foundation; he did not test his analysis with available data; ignored a clear alternative explanation of nose bar kickback; and failed to deal with or consider testing data on rotational forces for a nose bar kickback. Kadlec's testimony lacked reliability under *Daubert* and its progeny and was excluded from trial.

3. Arvin Hille.

The plaintiff filed a motion *in limine* to prevent Blount's expert, Arvin Hille, from testifying in relation to the efficacy or operation of the chain brake on the accused chainsaw. Blount intended to offer Hille's opinion that:

If the chainsaw had been equipped with a chain brake that had been properly maintained and working, to a reasonable degree of engineering probability, even with the chain that was on the saw, if there had been an injury, it would have been far less than

what occurred.

Hille Dep. vol. 2 at 133:19-134:1. Hille based this assertion on a rule of thumb that the "chain stop angle" (the point in the arc described by the chainsaw engaged in kickback at which the chain stops moving after the operational chain brake has engaged) is *roughly* half of the "computed kickback angle" (the measure of arc which a chainsaw should describe during a nose bar kickback for a given operating speed and cutting chain combination). Hille's 28 testimony in this respect fails the reliability criteria of *Daubert* and its progeny, and was excluded from trial.

***6** Hille was involved in Blount's measurements of kickback for various cutting saws and cutting chain combinations. He even designed the test equipment still in use for such measurements. Hille did not measure the accused chainsaw (McCulloch 610) for actual kickback angle when used with a functional chain brake and the accused cutting chain (Blount 72LG).

Hille's own testimony undermined the reliability of estimating a chain stop angle for this combination of equipment. First, Hille admits that he does not know the chain stop angle for this combination of equipment. Second, Hille admits that cutting chains respond unpredictably to chain speed itself-wherein safety chains kickback more severely (and consequently have a higher chain stop angle) when run at less than full speed, while professional chains tend to kick back more severely at higher chain speeds. Hille does not know what the actual kickback angle in this case was, but must extrapolate from the fact that the saw contacted the plaintiff's face. In short, Hille lacks a reliable basis for asserting that the chain brake-had it properly functioned-would have stopped the cutting chain motion prior to the chain's contact with the plaintiff's face.

In short, Hille's testimony in relation to the accused chain saw chain brake was not reliable. For that reason the Court granted the plaintiff's motion *in limine* to preclude offering such testimony at trial.

III. Conclusion.

Each motion *in limine* to preclude or exclude expert testimony was GRANTED.

IT SO ORDERED.

C.D.Cal.,2002.
Morin v. McCulloch Corp.
Not Reported in F.Supp.2d, 2002 WL 34357202 (C.D.Cal.)

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