

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

CITY OF LINCOLN, NEBRASKA,	)	4:10CV3030
	)	
Plaintiff,	)	
	)	MEMORANDUM
v.	)	AND ORDER
	)	
WINDSTREAM NEBRASKA, INC.,	)	
	)	
Defendant.	)	
_____	)	

In a final pretrial conference order (filing [141](#) at 12), the parties have agreed to waive a jury trial in this matter. In light of this development, I conclude that the pending *Daubert* motions (filings [123](#), [126](#)) should be denied without prejudice to reassertion at trial.

The district court’s “gatekeeping function” under *Daubert* ensures that expert evidence “submitted to the jury” is sufficiently relevant and reliable, [Bonner v. ISP Technologies, Inc., 259 F.3d 924, 929 \(8th Cir.2001\)](#) (emphasis added), but “[t]here is less need for the gatekeeper to keep the gate when the gatekeeper is keeping the gate only for himself,” [United States v. Brown, 415 F.3d 1257, 1269 \(11th Cir.2005\)](#). Similar reasons support less stringent application of *Daubert* in bench trials. See [Charles Alan Wright, Victor James Gold, 29 Fed. Prac. & Proc. Evid. § 6266, n. 90.2 \(2010\)](#), and cases cited. The “usual concerns of the [*Daubert*] rule—keeping unreliable expert testimony from the jury—are not present in such a setting.” [Metavante Corp. v. Emigrant Sav. Bank, 619 F.3d 748, 760 \(7th Cir.2010\)](#).

[In re Zurn Pex Plumbing Products Liability Litigation 644 F.3d 604, 613 \(8th Cir. 2011\)](#). See also [Penske Truck Leasing Co., L.P. v. Rion, LLC, No. 8:07CV294, 2008 WL 4540178, \\*2 \(D.Neb. Oct. 7, 2008\)](#) (denying *Daubert* motion without prejudice to reassertion at trial where right to trial by jury was waived); [S.E.C. v. Guenther,](#)

[395 F.Supp.2d 835, 843 n. 3 \(D.Neb. 2005\)](#) (discussing *Daubert* motion in context of bench trial).

Accordingly,

IT IS ORDERED:

1. Defendant's motion in limine to exclude the expert testimony of Garth Ashpaugh (filing [123](#)) is denied without prejudice to reassertion at trial.
2. Plaintiff's motion in limine to exclude the expert testimony of Daniel J. Caldwell and Jeffrey L. Pursley (filing [126](#)) is denied without prejudice to reassertion at trial.

August 23, 2011.

BY THE COURT:

*Richard G. Kopf*  
United States District Judge

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