

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

COMPLAINT OF:)	
BORGHESE LANE, LLC)	
)	
For Exoneration or Limitation of Liability)	Civil No. 2:18-cv-00533-MJH (Lead Case)
)	
)	Member and Related Cases: Civil Action Nos.
)	18-510; 18-178; 18-913; 18-902; 18-1647; and
)	18-317

OPINION and ORDER

This action arises out of a January 13, 2018 multiple-barge breakaway, that originated at Jack’s Run Fleet at approximately Mile 4 on the Ohio River and continued downriver to the Emsworth Lock and Dam. Presently before the Court is Borghese, ORS, and MRHS’s Motion in Limine to exclude opinions of Lee J. Nelson, citing to Fed. R. Evid. 702 and *Daubert v. Merrell Dow Pharmaceuticals*. (ECF No. 576). The matter is now ripe for decision.

Upon consideration of Borghese, ORS, and MRHS’s Motion (ECF No. 576), the respective briefs (ECF Nos. 577, 605, and 631), the arguments of counsel, and for the following reasons, Borghese, ORS, and MRHS’s Motion will be granted in part and denied in part.

I. Background

In the aftermath of the barge breakaway, several barge owners filed lawsuits against Borghese, McKees Rocks Harbor Services, LLC (MRHS), and Industry Terminal & Salvage Company (ITS), seeking recovery for damages resulting from breakaway barges that had been moored at Jack’s Run Fleet.

Ingram, Crouse, Heartland, and ARTCO (the “barge owners”) retained Lee J. Nelson as barge fleeting expert. Nelson is the president of Upper River Services in St. Paul, Minnesota,

which operates 21 barge fleets comprised of over 39,000 linear feet of shoreline. (ECF NO. 576-

8). Mr. Nelson opines, in part, as follows:

It is my opinion, based on my experience and the evidence I have reviewed, that [ITS, MRHS and/or Borghese's] failure to take action [...] was the sole cause of the January 13, 2018 breakaway from the Jack's Run Fleet and that the breakaway could have been avoided if such action had been taken.

(ECF No. 575-4).

In their *Daubert* motion, Borghese, ORS, and MRHS argue that 1) Mr. Nelson does not possess the professional qualifications to serve as an expert witness in this case on issues of causation of the breakaway; and 2) Nelson's opinions concerning causation were created without consideration of appropriate methodology and calculations.

II. Relevant Standard

Under Federal Rule of Evidence 702, the District Court is to act as a gatekeeper to, "ensure that any and all expert testimony or evidence is not only relevant, but also reliable." *United States v. Schiff*, 602 F.3d 152, 172 (3d Cir. 2010). Federal Rule of Evidence 702 provides in part that: "A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if,

- (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data; research;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702.

The Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) changed the criteria for the admissibility of expert testimony and charged trial courts to act as

“gate-keepers” to ensure that the proffered testimony is both relevant and reliable. *Id.* at 592-93.

In *Daubert*, the Supreme Court articulated the following two-prong test for determining the admissibility of expert testimony:

Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Id. at 593-94. Both prongs of the *Daubert* test must be satisfied before the proffered expert testimony may be admitted. *Id.* at 595. The Third Circuit has explained that Rule 702 “embodies a trilogy of restrictions” that expert testimony must meet for admissibility: qualification, reliability and fit. *Schneider ex rel. Estate of Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003). The Third Circuit has explained:

Rule 702 requires that the expert testimony must fit the issues in the case. In other words, the expert’s testimony must be relevant for the purposes of the case and must assist the trier of fact.

Id. at 404. When expert testimony is challenged under *Daubert*, “the proponents of the expert must establish admissibility by a preponderance of the evidence.” *Bruno v. Bozzuto’s, Inc.*, 311 F.R.D. 124, 135 (M.D. Pa. 2015).

III. Discussion

A. Qualifications

Borghese, ORS, and MRHS maintain that Mr. Nelson is not qualified to provide an expert opinion regarding the alleged forces exerted on the fleet prior to the breakaway. They further contend that Mr. Nelson testified that he does not have any engineering training and does not hold himself out to be a structural engineer or civil engineer specializing in maritime

construction. Borghese, ORS, and MRHS argue that Nelson also improperly attempts to offer metallurgical opinions regarding the cause of the failure of the U-bolt on Cell 8 while simultaneously stating that he is “not a metallurgist [and he] would not have understood” details regarding the type of steel used to construct the U-bolt or its age. The barge owners assert that Mr. Nelson is qualified to render his opinions and that he has provided proper support for these opinions based on his decades of practical experience in operating barge fleets.

An expert witness must “possess specialized expertise,” with “a broad range of knowledge, skills, and training qualify[ing] an expert.” *Schneider v. Fried*, 320 F.3d 396, 404 (3d Cir. 2003). At a minimum, a proffered expert ... must possess skill or knowledge greater than the average layman ...” *Waldorf v. Shuta*, 142 F.3d 601, 625 (3d Cir. 1998). Experts who lack formal education or training in a particular area must rely upon practical experience to demonstrate that they possess “the minimum qualifications necessary to testify as an expert.” *Elcock v. Kmart Corp.*, 233 F.3d 734, 743 (3d Cir. 2000).

Here, after a careful review of Mr. Nelson’s report and testimony relative to experience and education, Mr. Nelson possesses sufficient qualifications through practical and professional experience in barge operations to opine as a barge fleet expert in evaluating the actions or inactions of Borghese, ORS, and MRHS during the time leading up to and including the subject breakaway. However, in opining that “[ITS, MRHS and/or Borghese’s] failure to take action [...] was the **sole cause** of the January 13, 2018 breakaway,” Mr. Nelson exceeds the scope of his expertise in any opinion or testimony that addresses or fails to address other causes that are metallurgical or engineering in nature. So, while Mr. Nelson is qualified to testify to the barge fleet operators prudence of actions and standard of care, he does not possess the qualifications to opine that ITS, MRHS and/or Borghese’s failure to take action was the **sole** cause because, his

opinions as to sole cause, implicitly includes metallurgical and engineering matters that are outside his expertise.

Accordingly, Borghese, ORS, and MRHS's *Daubert* Motion, as regards Mr. Nelson's qualifications, will be granted in part and denied in part.

B. Methodology and Qualifications

Borghese, ORS, and MRHS also contend Mr. Nelson's improper opinions regarding forces exerted on the fleet are based on his subjective lay beliefs and are, therefore, unreliable and inadmissible. In particular, they argue that Nelson's opinions are devoid of any supporting calculations, analysis, or other methodology.

In response, the barge owners argue that Movants' argument ignores the reality that barge fleet operators, such as Mr. Nelson, must practically understand and apply concepts relating to force and leverage on a daily basis to ensure the safety and security of a barge fleet in any variety of river and weather conditions. Further, the barge owners maintain that, just because a barge fleet operator cannot mathematically quantify a force, does not mean that he or she is unable to assess and respond to its presence and effect.

When evaluating the reliability of a witness's methodology, a court is guided by several familiar factors drawn from *Daubert*:

(1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has been put.

See In re Paoli, 35 F.3d at 742 n.8. These factors "may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject

of his testimony.” See *Kumho Tire*, 526 U.S. at 150. Accordingly, the Rule 702 inquiry is a flexible one, and the court should also take into account any other relevant factors. See *Calhoun v. Yamaha Motor Corp.*, 350 F.3d 316, 321 (3d Cir. 2003).

Here, in this Court’s assessment of Mr. Nelson’s report and testimony, Borghese, ORS, and MRHS misplace their arguments relative to methodology and reliability. Mr. Nelson’s opinions derive from specialized practical experiences of the general forces and mechanics that barge fleets may face that would not depend on applying any particular scientific theory or mathematical calculation. From the Court’s perspective, Mr. Nelson is not opining on any ultimate issue in his opinions regarding the particular forces at issue. Instead, his expertise, based upon his relevant education and experience, will provide the trier of fact with generalized understanding of how fleet operators would and should respond under certain conditions. His opinions focus on the cause and effect of certain conditions based upon the length, width, and configuration of a barge fleet. Therefore, Mr. Nelson’s opinions are not subject to exclusion based upon any critiques regarding methodology.

Accordingly, Borghese, ORS, and MRHS’s *Daubert* Motion in Limine, to exclude opinions of Mr. Nelson on the bases of reliability and methodology, will be denied.

ORDER

Following consideration of Borghese, ORS, and MRHS’s Motion (ECF No. 576), the respective briefs (ECF Nos. 577, 605, and 631), the arguments of counsel, and for the following reasons, Borghese, ORS, and MRHS’s Motion is granted in part and denied in part. Mr. Nelson will be precluded from testifying that ITS, MRHS and/or Borghese’s failure to take action was the **sole** cause of the January 13, 2018 breakaway. In all other respects, the Motion is denied, and Mr. Nelson may testify as an expert and in accord with his May 12, 2021 report.

Dated: April 6, 2023

Marilyn J. Horan
United States District Judge