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Expert Witnesses: The Nevada Supreme Court Clarifies Adherence to NRS 50.275 and Judicial Discretion, Expressly Declining to Embrace the Federal Daubert Approach

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EXPERT WITNESSES:

THE NEVADA SUPREME COURT CLARIFIES ADHERENCE TO NRS 50.275 AND JUDICIAL DISCRETION, EXPRESSLY DECLINING TO EMBRACE THE FEDERAL DAUBERT APPROACH

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The law and practice of expert evidence admissibility has been in flux during much of the past 20 years. In response to concerns that expert admissibility was too easy and that courts were often admitting "junk science" testimony, the U.S. Supreme Court tightened the rules during the 1990s; but its directives to lower courts have been less than crystal clear and have met with varying responses in federal courts and in the states. Until recently, Nevada's position in this ongoing debate over "relaxed" versus "rigid" approaches to expert admissibility has been mixed and even unclear, embracing aspects of the federal approach but refusing to affirmatively endorse federal precedent. In *Higgs v. State of Nevada,* 222 P.3d 648 (Nev. Jan. 14, 2010), the court clarified its position, rejecting a mechanical or rigid checklist approach to admissibility. Despite the clarification provided by *Higgs* (or arguably because of it), expert witness testimony remains substantially a matter of judicial discretion, precluding broad and certain pronouncements as to admissibility.

History

During much of the 20th Century, the bulk of federal courts appeared to follow the *Frye* test for expert admissibility. See *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923) (holding polygraph insufficiently reliable to be used in evidence). Under *Frye,* scientific or technical evidence was admissible, if the technique or method in question was "generally accepted" within the relevant scientific community. Passage of the Federal Rules of Evidence during the 1970s called into question the continued vitality of the *Frye* test in federal courts.

Nevada did not adopt a state version of the federal rules but, instead, regulated expert evidence by statute (NRS 50.275). However, the relevant Nevada Statutes largely mirror the Federal rules, at least as they read, prior to relatively recent amendments to Federal Rule of Evidence 702, done to conform the express text of the federal evidence rule to 1990s U.S. Supreme Court precedent. However, both before and after

the codification of the federal rules, Nevada declined to expressly follow *Frye*. See *Yamaha Motor Co. v. Arnoult,* 955 P.2d 661 (Nev. 1998); *Santillanes v. State,* 765 P.2d 1147, 1150 (Nev. 1988) ([in the 65 years of the *Frye* test,] "we have neither cited nor adopted" it). See also *Dow Chemical Co. v. Mahlum,* 920 P.2d 98 (Nev. 1998)., overruled in part on other grounds, *GES, Inc. v. Corbitt,* 21 P.3d 11, 14-15 (2001).

The Statutory Standard

NRS 50.275 requires that a testifying expert must be:

- Qualified in an area of scientific, technical or other specialized knowledge (the qualification requirement),
- With specialized expertise that will assist the fact-finder in understanding the evidence or determining a fact at issue (the assistance requirement), and
- With testimony limited to matters within the scope of the expert's specialized knowledge (the limited scope requirement).

In determining whether a proffered expert is qualified, the court may consider credentials of the expert, such as: formal schooling and academic degrees, whether the expert is appropriately licensed, the expert's experience and specialized training and the extent of the expert's knowledge and prominence in a given field. The court may consider other appropriate factors as may arise.

The Incomplete Daubert "Revolution"

When the U.S. Supreme Court modified federal expert evidence law in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993), there was some expectation that Nevada, and other states, would expressly adopt *Daubert's* approach. In *Daubert,* the U.S. Supreme Court was rather self-consciously attempting to lay down stricter standards of admissibility, out of a sense that there had been too much admission of sketchy scientific studies in complex cases, including product liability (particularly regarding pharmaceuticals), pollution and medical malpractice actions. Since *Daubert,* federal expert evidence law has become more resistant to receipt of expert testimony. Where proffered expert evidence is excluded, the successful evidentiary movant (usually a defendant) has often been able to prevail on summary judgment because of the claimant's inability to use expert testimony to establish a genuine factual dispute as to defectiveness, causation or some other necessary element of a claim.

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States have been hesitant regarding adoption of *Daubert*. Nevada in particular has resisted embracing *Daubert,* although the court came reasonably close in its extensive discussion of expert evidence in *Hallmark,* which is not inconsistent with *Daubert*. See *Hallmark v. Eldridge* 189 P.3d 646, 651 (Nev. 2008) (reversing and remanding overly speculative testimony of a biomechanical engineer expert that plaintiff injuries could not have been caused by collision at issue was erroneously admitted; setting forth considerations for assessing expert testimony that largely track those set forth in *Daubert*).

The *Higgs* Decision

More recently, in *Higgs v. Nevada,* 222 P.3d 648 (Nev. 2010), the court specifically disavowed adherence to *Daubert*. See 222 P.3d at 650 ("we reject the notion that our decision in [*Hallmark*] adopted the standard set forth in *Daubert* inferentially"). In *Higgs*, the court reviewed the murder conviction of the husband of former State Auditor Kathy Augustine. Higgs was charged with poisoning her through injection of succinylcholine, a drug to which Higgs had access, through his work as a nurse.

During the prosecution, the government proffered expert testimony concerning the nature of the drug and its impact. Defense counsel challenged the testimony on procedural grounds (e.g., insufficient time for preparation to meet the testimony) and on substantive grounds, contending that the testimony did not meet the *Hallmark* standards of admissibility. The court rejected the defense attacks in an opinion that was unanimous as to the general ground rules regarding admissibility (Justices Cherry and Saitta dissented out of a view that the trial should have been continued in order to allow for additional defense preparation, but agreed regarding expert admissibility in general). More importantly, for future reference, *Higgs* clarified the court's approach to expert evidence.

In *Higgs,* the court reaffirmed the general rules of expert admissibility but took pains to emphasize that scientific precision was not required to make expert testimony admissible as long as the expert was sufficiently qualified and the testimony was helpful to the fact-finder and sufficiently reliable. A precise methodology is not required, however, nor must a proffer of expert testimony meet a precise checklist of criteria to gain admissibility. Part of the court's rationale in *Higgs* was concern that courts, following *Daubert,* had been overly rigid in applying the criteria for expert admissibility. See *Bahema v. Goodyear Tire & Rubber Co.,* 2010 Nev. LEXIS 23 at 10 (Nev., June 1, 2010) (In *Higgs,* "we have expressly rejected the adoption of federal authority that employs mechanical application of factors regarding qualifications of expert witnesses and that conflicts with our state law").

The *Higgs* court reviewed U.S. Supreme Court evidence precedent since *Daubert* and noted its emphasis on discretion for the trial judge, in effect joining academic critics who have argued that many trial courts have been too aggressive in using a too-rigid version of *Daubert* to exclude reasonably reliable and helpful testimony, rendered by experts who were more than junk scientists. See 222 P.3d at 655-59 (citing scholarly articles finding misunderstanding and misapplication of *Daubert* factors by federal trial courts). Although finding the *Daubert* approach itself acceptable, the *Higgs* court took issue with the "subsequent rigid application of the

enumerated factors" (222 P.3d at 657). Similarly, the *Higgs* court emphasized that *Hallmark* was "not intended to cause confusion and cast doubt on the [traditional Nevada] standard of expert witness testimony [but] was meant to clarify the rule that, in Nevada, NRS 50.275 is the blueprint for expert witness testimony." See 222 P.3d at 658.

The Current Standards Governing Expert Evidence

Although *Higgs* clearly rejects a formulaic approach to expert testimony, it is still of course required that expert testimony be helpful to the fact-finder and that the expert be qualified through possession of special knowledge, skill, experience, training or education. See 222 P.3d at 659. The *Higgs* court emphasized that the language of NRS 50.275 and the judge's sound discretion provide the touchstone of admissibility and that the additional requirements of Federal Rule of Evidence 702 and *Daubert* imposed additional criteria for admissibility that need not be used by Nevada courts. See 222 P.3d at 659.

"What *Hallmark* and similar cases from sister jurisdictions demonstrate is that whether dealing with scientific or nonscientific expert testimony, there is the inevitable overlap of factors gatekeepers will consider: mainly relevancy and reliability. By not adopting the *Daubert* standard as a limitation on judges' considerations, with respect to the admission of expert testimony, we give Nevada trial judges wide discretion, within the parameters of NRS 50.275, to fulfill their gate-keeping duties. We determine that the framework provided by NRS 50.275 sets a degree of regulation upon admitting expert witness testimony, without usurping the trial judge's gate-keeping function."

See 222 P.3d at 548-59. See also *Higgs,* 222 P.3d at 658 ("we see nothing about our decision to adhere to state law, while looking at federal jurisprudence for guidance – when *needed*") (italics in original).

Subsequent to *Higgs,* the court rejected a challenge to expert testimony because of failure to make timely objection and on implicit harmless error rounds. However, the court nonetheless disapproved of purported "recall bias" expert testimony as unduly speculative as applied to issues of witness credibility. See *Thomas v. Hardwick,* __ P.3d __, 2010 Nev. LEXIS 19 at *26-*27, 126 Nev. Adv.Op. No.16) (Nev. May 27, 2010) ("we have found no published case approving its admission on individual witness credibility ... such use of recall bias testimony invades the province of the jury and seems unhelpful. We thus decline respondents' invitation to equate recall bias testimony with the cross-cultural eyewitness identification testimony we permitted in *Echavarria v. State,* 108 Nev. 734, 839 P.2d 589 (1992).")

Although *Higgs* marks a withdrawal from *Hallmark,* in favor of traditional Nevada expert evidence law rather than an implicit embrace of the federal *Daubert* standard, the *Higgs* precedent, as applied in *Thomas,* demonstrates that the Nevada Supreme Court and state trial courts retain substantial power to limit the admissibility of expert evidence seen as suspect or misleading. ■

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