



The Daubert Conundrum

Jon Barton

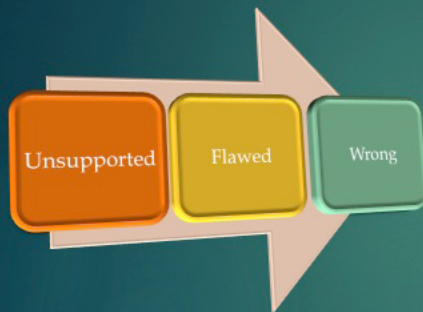
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just Plain Bad



So bad they
are are good

To strike or Not to strike?

Pros

- ▶ Potential Early Disposition;
 - ▶ Setting up the MSJ.
- ▶ Educating Judge;
 - ▶ Evidentiary Rulings.
- ▶ Demoralizing Effect;
 - ▶ Settlement Strategy;
 - ▶ Reduction in Numbers.
- ▶ Reducing Claims or Issues
 - ▶ Limiting instructions

Cons

- ▶ Disclose Problems in Opponents Case;
 - ▶ Corrective Measures;
 - ▶ Testing;
 - ▶ Inspection;
 - ▶ Supplemental Reports;
 - ▶ Distinguishing Excuses;
- ▶ Leave to Designate New Experts;
- ▶ Minimization of Cross Examination Effectiveness.

Unintended Consequences



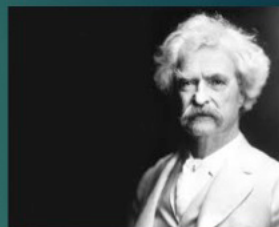
The Numbers

2000-2011

11, 262 Cases

6,919 Challenges

250% Increase





Unprecedented



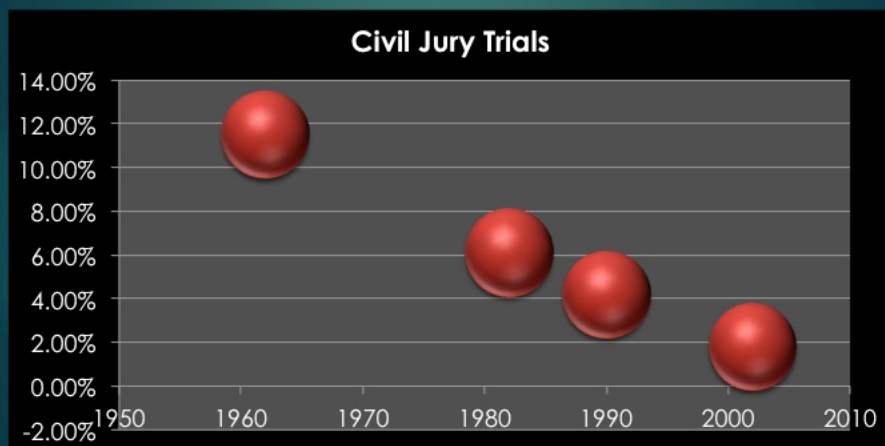
Growth



Consider the



Decline





Victory!

Summit filed a Motion to Bar the Testimony and Opinions of Plaintiff's Expert Norman Johanson, which the court granted on October 13, 2011. (Doc. No. 49). The undersigned found that the testing performed by Mr. Johanson to support his theory was unreliable and inadmissible. In the interest of justice, however, the court granted plaintiff ten days in which to request an additional thirty days to attempt to remedy the deficiency in Mr. Johanson's testimony.

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The Risk



Defeat!



Third Time is a Charm...

The court has carefully reviewed the supplemental report of Mr. Johanson, along with the exhibits submitted by the parties, as well as the parties' briefs, and concludes that there is no basis to reconsider the court's previous order excluding the testimony and opinions of Mr. Johanson.

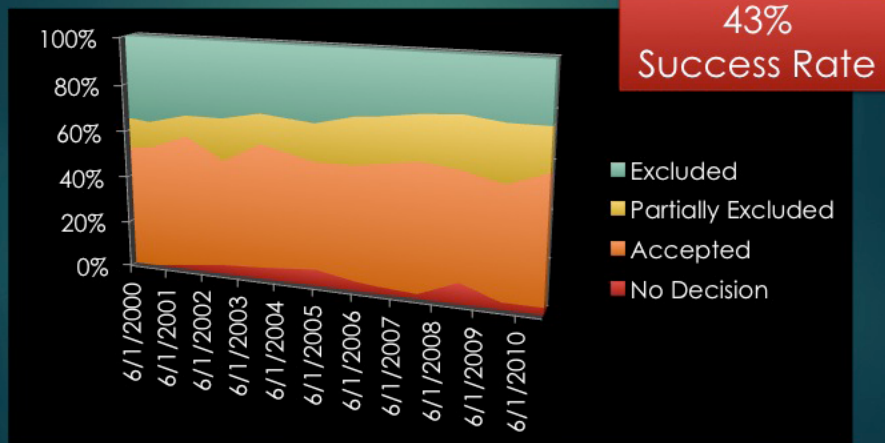
As the court will address in more detail below, Mr. Johanson's subsequent testing suffered from similar deficiencies as the court identified in its earlier order excluding Mr. Johanson's testimony and opinions.

and opinions.

similar deficiencies as the court identified in its earlier order excluding Mr. Johanson's testimony

Lacking Reliability

Mgixed Bag



Focus The Attack



In 2011 76% of Financial Experts Excluded on Reliability.

What About State Law?

The Court has no intention of acceding to the importation of federal practice into the matter of admitting expert testimony in state court. Although *State Board of Registration v. McDonagh*, 123 S.W.3d 146 (Mo.banc 2003) suggests that the Court has an obligation under the statute to consider whether the facts used by the expert are of a type reasonably relied on by experts in the field or the methodology is otherwise reasonably reliable, the Court does not believe that either §490.065 or *McDonagh* contemplate summary judgments in the guise of motions to strike experts.

In the guise of motions to strike experts.

perceive that either §490.065 or McDonagh contemplate summary judgments

Outcome Determinative

Wait and See Approach



Prima Facie [Latin, On the first appearance.] A fact presumed to be true unless it is disproved.

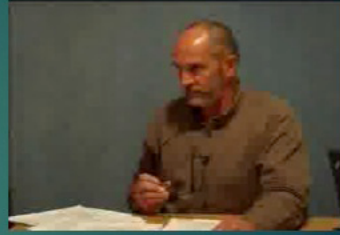


If the evidence at trial fails to support assumptions, then his opinions will be inadmissible and, in effect, plaintiff's case will fail. It appears, however, that plaintiff can establish prima facie that the assumed conditions actually existed.

prima facie that the assumed conditions actually existed.

why Pre-strike?

Known Quality
Flawed Methodology
Locked Testimony
Established Cross-Examination Plan
Opportunity to Stake at Trial



All **Bad** things must come to an end.

About Jon Barton

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Jonathan Barton is a shareholder of Sandberg Phoenix & von Gontard. He is a member of the firm's products liability practice group and is active in the firm's general litigation and business litigation practice. Jon is engaged in all aspects of litigation from the initial claim investigation stage through trial before the bench and jury in both state and federal courts. He has extensive experience in defending products liability cases involving a wide array of industrial machinery, motorized vehicles, electrical components (including medium and high voltage equipment) and consumer goods. Jon is also experienced in cases involving fire science, premises liability, transportation law, intellectual property litigation and insurance defense.

Jon is a regular speaker to members of the Missouri and Illinois Bar as well as attorneys and general counsel on a national basis. He presents seminars on issues involving integration of technology during the discovery process and at trial as well as advanced trial and deposition skills and techniques. Jon also hosts a yearly web seminar on ethics from the litigator's perspective.

Jon received the honor of being named by Missouri Lawyers Weekly as one of the Up & Coming Lawyers in Missouri for 2008. Missouri & Kansas Super Lawyers named him a Rising Star in 2010 and a Super Lawyer in 2011 and 2012 in the area of Personal Injury Defense: Products.

He was chosen as one of the St. Louis Business Journal's "40 Under 40" recipients based on his career achievements and community work. In addition, Jon received an AV Peer Review Rating on Martindale Hubbell which was given by his peers for his high level of professional excellence.

Industries

- Automotive
- Consumer Products
- Drugs and Pharmaceuticals
- Heavy Machinery
- Hunting and Sporting Goods
- Manufacturing / Distribution
- Medical Devices
- Recreational Products
- Trucking

Services

- Personal Injury and Tort Defense
- Product and Toxic Tort Liability

Education

- Juris Doctor, with honors; Drake University School of Law; 1998.
- B.A. in Political Science; Saint Louis University; 1994.