

APPENDIX

NON-EXCLUSIVE LIST OF RECENT CIVIL AND CRIMINAL CASES INVOLVING RELIABILITY CHALLENGES TO EXPERT TESTIMONY

Accident Reconstruction: *Sigler v. Am. Honda Motor Co.*, 532 F.3d 469, 479 (6th Cir. 2008) (finding that the district court did not abuse its discretion in excluding mechanic's testimony on accident reconstruction and potential vehicle defects); *Chapman v. Maytag Corp.*, 297 F.3d 682, 688 (7th Cir. 2002) (finding expert's testimony about his "resistive short" theory in product case unreliable); *Smith v. BMW N. Am., Inc.*, 308 F.3d 913, 921 (8th Cir. 2002) (admitting accident re-constructionist's testimony as to principal direction of force during accident, but excluding his testimony as to the magnitude of barrier-equivalent velocity as unreliable); *Smith v. Jacobs Engr. Group, Inc.*, 2008 WL 4194537, at *4 (N.D. Fla. Apr. 14, 2008) (denying the motion to strike expert's testimony regarding accident reconstruction); *Wofford v. Bonilla*, 2008 WL 2517155, at *6 (E.D. Okla. June 20, 2008) (excluding testimony about accident reconstruction under *Daubert*); *Smith v. Yang*, 829 N.E.2d 624, 629 (Ind. App. 2005) (finding accident re-constructionist's "faked-left-syndrome" theory unreliable); *Volkswagen of Am., Inc. v. Ramirez*, 159 S.W.3d 897, 906 (Tex. 2004) (finding accident re-constructionist's opinion unreliable); *Morton Intl. v. Gillespie*, 39 S.W.3d 651, 655 (Tex. App. 2001) (finding mechanical engineer's testimony as to air bag deployment reliable).

Ballistics Identification: *U.S. v. Mikos*, 539 F.3d 706, 710 (7th Cir. 2008) (finding that court did not abuse its discretion in permitting testimony of FBI ballistics agent); *U.S. v. Foster*, 300 F. Supp. 2d 375, 376 (D. Md. 2004) (finding that comparison of spent cartridge casings was reliable); *State v. Williams*, 974 So. 2d 157, 163 (La. App. 2d Cir. 2008) (finding expert's testimony reliable, which linked spent bullet found at the crime scene to the gun seized by police); *State v. Wegmann*, 2008 WL

434981, at *12 (Ohio App. 3d Feb. 19, 2008) (finding that the trial court did not abuse its discretion in excluding testimony about ballistics testing).

Bite-mark Comparisons: *Howard v. State*, 853 So. 2d 781, 796 (Miss. 2003) (admitting bite-mark-comparison opinion testimony); *In re Termination of Parental Rights to CG, SG, JG and SG*, 81 P.3d 208, 212 (Wyo. 2003) (finding bite-mark-comparison opinion testimony reliable).

Blood Spatter: *U.S. v. Ortiz-Romero*, 2008 WL 4190562, at *1 (9th Cir. Sept. 12, 2008) (finding that the district court's error in not making an express finding about the reliability of testimony was harmless because of his qualifications and other admissible blood pattern evidence); *Anderson v. State*, 863 So. 2d 169, 181 (Fla. 2003) (admitting blood stain analyst's testimony); *Jones v. State*, 918 So. 2d 1220, 1229 (Miss. 2005) (admitting expert's testimony as to blood patterns on defendant's tee shirt).

Breathalyzer: *Roettinger v. Commr. of Pub. Safety*, 633 N.W.2d 70 (Minn. App. 2001) (finding alcohol breath test prime facie admissible); *Fulenwider v. State*, 176 S.W.3d 290 (Tex. Crim. App. 2004) (admitting testimony as to alcohol concentration at the time of the offense based on extrapolation).

Canine Sniff: *U.S. v. Rosario-Peralta*, 199 F.3d 552 (1st Cir. 1999) (admitting testimony as to dog sniff evidence); *People v. Willis*, 9 Cal. Rptr. 3d 235, 240 (Cal. App. 2d Dist. 2004) (excluding testimony as to the "scent-transfer-unit" methodology as unreliable).

Certified Public Accountants: *First Marblehead Corp. v. House*, 541 F.3d 36, 43 (1st Cir. Sept. 8, 2008) (finding no abuse of discretion in admitting certified public accountant's testimony on stocks); *Nova Consulting Group v. Engr. Consulting Servs.*, 2008 WL 3889995, at *3 (5th Cir. Aug. 22, 2008) (finding no abuse of discretion in admitting certified public accountant's testimony about the inner-workings of a consulting business); *Tuf Racing Prods. v. Am. Suzuki Motor Corp.*, 223 F.3d 585, 591 (7th Cir. 2000) (holding expert economist not subject to

Daubert standard because he was performing accounting, not scrutinizing science); *Sudo Props., Inc. v. Terrebonne Parish Consol. Govt.*, 2008 WL 2623000, at *10 (E.D. La. July 2, 2008) (admitting certified public accountant's testimony on damages).

Differential Diagnosis: *Hardyman v. Norfolk and W. Ry. Co.*, 243 F.3d 255, 267 (6th Cir. 2001) (finding that trial court's exclusion of expert's differential diagnosis testimony as to the cause of carpal tunnel syndrome was an abuse of discretion); *Bland v. Verizon Wireless, LLC*, 538 F.3d 893, 897–898 (8th Cir. 2008) (finding no abuse of discretion in excluding doctor's testimony that ingested Freon caused asthma because testimony was not based on proper differential diagnosis and was therefore unreliable under *Daubert*); *Stasior v. Natl. R.R. Passenger Corp.*, 19 F. Supp. 2d 835, 851 (N.D. Ill. 1998) (holding that although the expert was qualified, his actual testimony was unreliable under *Daubert*); *State v. McMullen*, 900 A.2d 103, 119 (Del. Super. 2006) (finding pediatric condition falsification (PCF) causation opinion reliable); *Epp v. Lauby*, 715 N.W.2d 501, 508 (Neb. 2006) (finding that trial court's exclusion of testimony as to fibromyalgia causation was an abuse of discretion); *Carlson v. Okerstrom*, 675 N.W.2d 89, 97 (Neb. 2004) (finding testimony causally relating neurologic bladder to trauma reliable); *Alder v. Bayer Corp., AGFA Div.*, 61 P.3d 1068 (Utah 2002) (admitting differential diagnosis testimony as to chronic fatigue syndrome, fibromyalgia, and chemically-induced cognitive deficits, but excluding testimony as to multiple chemical sensitivity).

DNA: *U.S. v. Beverly*, 369 F.3d 516, 531 (6th Cir. 2004) (finding that district court did not abuse its discretion in admitting mitochondrial DNA test results); *U.S. v. Gipson*, 383 F.3d 689, 697 (8th Cir. 2004); *States v. Hicks*, 103 F.3d 837, 844–847 (9th Cir. 1996) (finding DNA evidence from DNA profiler kits reliable); *Florists' Mut. Ins. Co. v. Lewis Taylor Farms, Inc.*, 2008 WL 875493, at *22 (M.D. Ga. Mar. 27, 2008) (admitting expert testimony regarding bacterial spot testing); *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 2008 WL 2607852, at *6 (S.D.N.Y. July 1, 2008) (permitting expert to testify as to effects of methyl tertiary butyl ether exposure on DNA and its classifi-

cation as a carcinogen, but not as to the reasonableness of a person's concerns about exposure); *U.S. v. Trala*, 162 F. Supp. 2d 336, 346 (D. Del. 2001) (finding testimony regarding DNA analysis admissible).

Economic Testimony: *Elcock v. Kmart Corp.*, 233 F.3d 734, 740 (3d Cir. 2000) (finding that the district court abused its discretion in admitting testimony regarding economic damages model); *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1166 (10th Cir. 2000) (excluding economic-valuation-theory testimony under *Daubert*); *Suazo v. Atl. Sounding Co.*, 2008 WL 57832, at *1 (E.D. La. Jan. 2, 2008) (denying motion to exclude expert testimony as to lost earnings).

Eyewitness Identification: *U.S. v. Brownlee*, 454 F.3d 131 (3d Cir. 2006) (applying Federal Rule of Evidence 702 and finding eyewitness testimony reliable and fit); *U.S. v. Welch*, 368 F.3d 970 (7th Cir. 2004) (holding that district court's exclusion of testimony regarding reliability of eyewitness was not an abuse of discretion); *U.S. v. Rodriguez-Felix*, 450 F.3d 1117 (10th Cir. 2006) (holding that subject to trial court's careful supervision, properly conceived expert testimony is admissible to challenge or support eyewitness evidence); *U.S. v. Graves*, 465 F. Supp. 2d 450 (E.D. Pa. 2006) (admitting eyewitness testimony as reliable); *U.S. v. Garcia*, 44 M.J. 27 (Armed Forces App. 1996) (excluding expert testimony on reliability of eyewitness identification on Federal Rule of Evidence 403 grounds without applying *Daubert*); *State v. Trotter*, 127 P.3d 972 (Kan. 2006) (finding testimony as to certain psychological factors that may interfere with accurate eyewitness identification reliable).

Field Sobriety Test: *U.S. v. Nguyen*, 2008 WL 540230, at *14 (E.D. Cal. Feb. 25, 2008) (admitting testimony about a field sobriety test as reliable under *Daubert*); *City of W. Bend v. Wilkens*, 693 N.W.2d 324 (Wis. App. 2005) (finding field sobriety test not science and *Daubert* inapplicable).

Fingerprint Analysis: *U.S. v. Crisp*, 324 F.3d 261 (4th Cir. 2003) (holding fingerprint testimony satisfied *Daubert*), *cert. denied*, 540 U.S. 888 (2003) (taking judicial notice of the reli-

ability of a technique “so firmly established as to have attained the statue of scientific law”); *U.S. v. Calderon-Segura*, 512 F.3d 1104, 1106 (9th Cir. 2008) (admitting expert testimony regarding fingerprint identification); *U.S. v. Abreu*, 406 F.3d 1304 (11th Cir. 2005) (holding that fingerprint evidence is reliable under *Daubert*); *U.S. v. Llera Plaza*, 179 F. Supp. 444 (E.D. Pa. 2001), *vacated and reinstated*, 188 F. Supp 2d. 549 (E.D. Pa. 2002) (wherein Judge Pollack originally applied the *Daubert* factors and found fingerprint analysis unreliable only to shortly thereafter vacate his opinion).

Footprint Impressions: *U.S. v. Mahone*, 328 F. Supp. 2d 77 (D. Me. 2004) (finding testimony reliable under Federal Rule of Evidence 702).

Global Positioning System: *Brown v. State*, 163 S.W. 3d 818 (Tex. App. 2005) (finding GPS reliable under Federal Rule of Evidence 702).

Hair Sample Analysis: *U.S. v. Brown*, 557 F.2d 541 (6th Cir. 1977) (finding the government failed to establish reliability of methodology); *People v. Huggins*, 131 P.3d 995 (Cal. 2006), *cert. denied*, 127 S. Ct. 501 (2006) (admitting evidence while noting that other jurisdictions question reliability); *Murphy v. Cmmw.*, 2008 WL 1850626, at *2 (Ky. Apr. 24, 2008) (admitted expert testimony that microscopic hair analysis showed defendant was not excluded as the source).

Handwriting Analysis: *U.S. v. Yagman*, 2007 WL 4409618 (C.D. Cal. 2007) (finding methodology reliable and limiting testimony to general observation); *U.S. v. Prime*, 220 F. Supp. 2d 1203 (W.D. Wash. 2002) (admitting handwriting-analysis testimony couched in terms of “probabilities” on a record carefully applying *Daubert* factors citing other circuits in accord).

Insanity Defense: *U.S. v. Eff*, 524 F.3d 712, 720 (5th Cir. 2008) (excluding testimony by expert in neurogenetic disorders as to whether defendant was able to appreciate the nature and quality or wrongfulness of his actions).

Polygraph Examinations: *U.S. v. Scheffer*, 523 U.S. 303 (1998) (holding that per se exclusion of polygraph testimony in court-martial proceeding did not violate the Federal Rule of Evidence 702); *U.S. v. Allard*, 464 F.3d 529 (5th Cir. 2006) (admitting polygraph evidence when not offered for truth of result but in rebuttal); *U.S. v. Henderson*, 409 F.3d 1293 (11th Cir. 2005), *cert. denied*, 546 U.S. 1169 (2006) (finding no abuse of discretion in excluding polygraph evidence under Federal Rule of Evidence 702); *U.S. v. Moultrie*, 552 F. Supp. 2d 598, 602 (N.D. Miss. 2008) (holding that defendant failed to establish that the science behind the polygraph examination was sufficiently reliable); *People v. Wilkinson*, 94 P.3d 551 (Cal. 2004) (citing California statutory categorical prohibition on admission of polygraph evidence).

Products Liability:

- **Causation:** *Pride v. BIC Corp.*, 218 F.3d 566 (6th Cir. 2000) (holding testimony relating fixed-flame cigarette lighter to cause and origin of fire unreliable); *Porter v. Whitehall Laboratories, Inc.*, 9 F.3d 607 (7th Cir. 1993) (finding testimony causally relating renal failure to ibuprofen unreliable); *Bitler v. A.O. Smith Corp.*, 391 F.3d 1114 (10th Cir. 2004) (finding causation testimony relating water heater to source of explosion unreliable); *Neal-Lomax ex rel. Lomax v. Las Vegas Metro. Police Dept.*, 2008 WL 4054268, at *13 (D. Nev. Sept. 2, 2008) (excluding expert testimony indicating death was caused by a taser); *Morton Intl. v. Gillespie*, 39 S.W.3d 651 (Tex. App. Texarkana Dist. 2001) (finding mechanical engineers opinion regarding airbag deployment reliable).
- **Design Defect:** *Watkins v. Telsmith, Inc.*, 121 F.3d 984 (5th Cir. 1997) (finding expert failed to establish defect in conveyor); *Dhillon v. Crown Controls Corp.*, 269 F.3d 865 (7th Cir. 2001) (excluding fork lift rear door alternative design testimony); *Bourelle v. Crown Equip. Corp.*, 220 F.3d 532 (7th Cir. 2000) (excluding fork lift alternative design testimony); *Weir v. Crown*

Equip. Corp., 217 F.3d 453 (7th Cir. 2000) (excluding fork lift alternative wedge design testimony); *Giles v. Minders, Inc.*, 242 F.3d 810 (8th Cir. 2001) (finding freezer defect testimony unreliable); *Anderson v. Ridge Tool Co.*, 2008 WL 3849923, at *1 (E.D. Ky. Aug. 14, 2008) (admitting expert testimony as to the design of the product allegedly causing the injury); *Allstate Ins. Co. v. Hamilton Beach/Proctor-Silex, Inc.*, 2008 WL 3891259, at **6, 8 (W.D. Pa. Aug. 19, 2008) (allowing expert testimony as to design defect even though not every *Daubert* factor was met); *Cali v. Danek Med., Inc.*, 24 F. Supp. 2d 941 (W.D. Wis. 1998) (excluding defect testimony regarding pedicle screws); *Bagley v. Mazda Motor Corp.*, 864 So. 2d 301 (Ala. 2003) (holding expert failed to establish retention design defect); *Cummins v. Lyle Indus.*, 93 F.3d 362 (Ind. 1996) (excluding trim press alternative design testimony).

- **Warning Defect:** *Early v. Toyota Motor Corp.*, 277 Fed. Appx. 581, 586 (6th Cir. 2008) (holding that district court did not abuse its discretion in excluding expert testimony as to design and warning defects); *Jaurequi v. Carter Mfr. Co., Inc.*, 173 F.3d 1076 (8th Cir. 1999) (finding mechanical engineer and human factors engineer testimony regarding warning unreliable).

Real Estate Evaluation: *Fed. Deposit Ins. Corp. v. Suna Assoc. Inc.*, 80 F.3d 681 (2d Cir. 1996) (finding property valuation method reliable); *Alton Real Est. Inv., LLC v. Allied Waste Transp., Inc.*, 2008 WL 4148577, at *2 (S.D. Ill. Sept. 3, 2008) (allowing expert testimony as to the safety of a garage beam); *In re Maple*, 2008 WL 3539793, at *6 (Bankr. D. Vt. Aug. 11, 2008) (allowing expert testimony as to the value of a mobile home).

Shaken Baby: *State v. Leibhart*, 662 N.W.2d 618 (Neb. 2003) (finding expert's opinion reliable); *State v. Cort*, 766 A.2d 260 (N.H. 2000) (admitting on grounds that opinion was not scien-

tific evidence, defendant failed to raise *Daubert* issue and it was not addressed).

Shoe Print Comparisons: *U.S. v. Turner*, 2008 WL 2699921, at *7 (6th Cir. July 9, 2008) (holding that the district court did not abuse its discretion by admitting expert testimony regarding analysis of a boot print); *U.S. v. Allen*, 390 F.3d 944 (7th Cir. 2004) (holding expert testimony relevant and reliable under *Daubert*).

SYNDROME EVIDENCE:

- **Battered-Child Syndrome:** *Estelle v. McGuire*, 502 U.S. 62 (1991) (affirming application of California law allowing battered-child-syndrome testimony in criminal cases).
- **Battered-Woman Syndrome:** *Arcoren v. U.S.*, 929 F.2d 1235 (8th Cir. 1991), *cert. denied*, 502 U.S. 913 (1991) (finding testimony admissible); *State v. Haines*, 860 N.E.2d 91 (Ohio 2006) (admitting battered-women-syndrome testimony in state's case in chief).
- **Child Sexual Abuse:** *U.S. v. Hitt*, 473 F.3d 146 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2083 (2006) (allowing the use of expert testimony to explain behavior of those accused of sexual offenses); *U.S. v. Eagle*, 515 F.3d 794, 801 (8th Cir. 2007) (allowing expert testimony regarding characteristics of sexually-abused children in general and how they compared with the characteristics exhibited by the child at issue); *U.S. v. Kirkie*, 261 F.3d 761 (8th Cir. 2001) (admitting child-sexual-abuse testimony); *U.S. v. Bighead*, 128 F.3d 1329 (9th Cir. 1997) (admitting child-sexual-abuse testimony and finding *Daubert* inapplicable); *Bowen v. Hanley*, 2008 WL 974654, at *2 (W.D. Ky. Apr. 8, 2008) (allowing expert testimony from a psychiatrist about the likelihood that the defendant committed the alleged pedophilic acts).

- **Post-Traumatic Stress:** *S.M. v. J.K.*, 262 F.3d 914 (9th Cir. 2001) (admitting post-traumatic stress disorder opinion testimony).
- **Rape Trauma:** *State v. Kinney*, 762 A.2d 833 (Vt. 2000) (finding rape-trauma-syndrome evidence as to characteristics of rape victims admissible and finding testimony on rate of false reporting inadmissible).
- **Separation-Violence Syndrome:** *Ryan v. State*, 988 P.2d 46 (Wyo. 1999) (finding testimony unreliable).
- **Shaken Baby:** *Cmmw. v. Martin*, 2008 WL 2388382, at *9 (Ky. App. June 13, 2008) (holding that trial court's exclusion of expert testimony regarding shaken-baby syndrome was an abuse of discretion); *State v. Leibhart*, 662 N.W. 2d 618 (Neb. 2003) (finding expert's opinion reliable); *State v. Cort*, 766 A.2d 260 (N.H. 2000) (admitting on grounds that opinion was not scientific evidence, defendant failed to raise *Daubert* issue, and it was not addressed).

Toxic-Tort Litigation: *In re TMI Litigation*, 193 F.3d 613 (3d Cir. 1999), *cert. denied*, 530 U.S. 1225 (2000) (excluding testimony causally relating radiation to neoplasms as unreliable under *Daubert*); *Bradley v. Brown*, 42 F.3d 434 (7th Cir. 1994) (finding multiple-chemical-sensitivity causation testimony unreliable); *Mitchell v. Gencorp Inc.*, 165 F.3d 778 (10th Cir. 1999) (excluding testimony causally relating chemicals to myelogenous leukemia unreliable under *Daubert*); *Brasher v. Sandoz Pharms. Corp.*, 160 F. Supp. 2d 1291 (N.D. Ala. 2001) (finding testimony causally relating Parlodel to ischemic stroke reliable); *Globetti v. Sandoz Pharms. Corp.*, 111 F. Supp. 2d 1174 (N.D. Ala. 2000) (finding testimony causally relating Parlodel to acute myocardial infarction reliable); *Glastetter v. Novartis Pharms. Corp.*, 107 F. Supp. 2d 1015 (E.D. Mo. 2000) (finding testimony causally relating Parlodel to intracerebral hemorrhage unreliable); *Diaz v. Johnson Matthey, Inc.*, 893 F. Supp. 358 (D.N.J. 1995) (finding testimony causally relating asthmatic symptoms and platinum allergy or platinum salts unreli-

able); *Gabbard v. Linn-Benton Housing Auth.*, 219 F. Supp. 2d 1130 (D. Or. 2002) (finding expert testimony causally relating multiple chemical sensitivity to herbicides and latex caulk unreliable); *Perry v. Novartis Pharms. Corp.*, 564 F. Supp. 2d 452 (E.D. Pa. 2008) (allowing some expert testimony and not other expert testimony in toxic-tort case involving the prescription drug Elidel); *Minner v. Am. Mortg. & Guar. Co.*, 791 A.2d 826 (Del. Super. 2000) (finding expert testimony causally relating sick building syndrome, chronic fatigue, fibromyalgia to chemical exposure unreliable and finding reactive airway dysfunction syndrome and toxic encephalopathy reliable); *Boren v. Burlington N. & Santa Fe Ry.*, 637 N.W.2d 910 (Neb. 2002) (finding testimony causally relating cirrhosis to chemical reliable under Neb. Evid. Rule 702); *Matt Dietz Co. v. Torres*, 198 S.W.3d 798 (Tex. App. 2006) (finding testimony causally relating laryngeal cancer to pesticides unreliable).

Voice Spectrograph Analysis: *U.S. v. Angleton*, 269 F. Supp. 2d 892, 905 (S.D. Tex. 2003) (excluding this type of evidence under a *Daubert*, *Kumho*, and Federal Rule of Evidence 702(2) analysis).