No. 1-21-1486

IN THE APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

DAVID MOLITOR,	**)**	**Appeal from the Circuit Court**
Plaintiff-Appellant,	**)**	**of Cook County, Law Division**
	)	
vs.	**)**	**Case No. 2018 L 001934**
	)	
BNSF RAILWAY COMPANY,	**)**	**Honorable Mary Colleen Wiley,**
Defendant-Appellee.	**)**	**Judge Presiding**

REPLY BRIEF OF PLAINTIFF-APPELLANT DAVID MOLITOR

Jonathan Sternberg, Ill. #6331607
Jonathan Sternberg, Attorney, P.C.
2323 Grand Boulevard #1100
Kansas City, Missouri 64108
Telephone: (816) 292-7020
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

Stephen F. Monroe, IL#6305823
Marc J. Bern & Partners, LLP
200 West Madison St., Ste. 2100
Chicago, IL 60606
Phone: (312) 894-7941
smonroe@bernllp.com

Counsel for Plaintiff-Appellant

Table of Points and Authorities

Reply Argument 1

A. Summary 1

45 U.S.C. § 51 1

Illinois Rule of Evidence 702 1

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) 1-3

B. The FELA does not alter *Frye*'s core analysis of reliability and Mr. Molitor never argued it does; instead, as with the particular subject of expert testimony at issue in any case, the FELA's relaxed standard of causation informs whether the expert's testimony whose reliability is in question would assist the trier of fact. 3

Illinois Rule of Evidence 702 4

BNSF Ry. Co. v. Baca, No. 02-17-00168-cv, 2018 WL 1528573 (Tex. App. 2018) 5

Claar v. Burlington N. R.R. Co., 29 F.3d 499 (9th Cir. 1994) 5

Com. Mortg. & Fin. Co. v. Am. Nat'l Bank & Tr. Co. of Chi., 253 Ill. App. 3d 697 (2d Dist. 1993) 5

Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993) .. 3, 5-6

Donellan v. First Student, Inc., 383 Ill. App. 3d 1040 (1st Dist. 2008) 6

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) 3-6

Hines v. Consol. Rail Corp., 926 F.2d 262 (3d Cir. 1999) 4-5

Hose v. Chi. N.W. Transp. Co., 70 F.3d 968 (8th Cir. 1995) 5

Kopplin v. Wisc. Cent. Ltd., 914 F.3d 1099 (7th Cir. 2019) 5

Schindler v. Dravo Basic Materials Co., 790 F. App'x 621 (5th Cir. 2019) 5

Taylor v. Consol. Rail Corp., 114 F.3d 1189 (6th Cir. 1997) 5

Wills v. Amerada Hess Corp., 379 F.3d 32 (2d Cir. 2004) 5

C. Mr. Molitor has never argued the law of Illinois "shields expert witnesses from judicial inquiry," but especially in the face of a motion for summary judgment, the inquiry into the underlying foundation for the expert's conclusions is limited to whether, viewing the record in the light most favorable to the plaintiff, there is any articulable factual basis for the expert's conclusions. 6

Illinois Rule of Evidence 702 7

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) 6-7

Donaldson v. Cent. Ill. Pub. Serv. Co., 199 Ill.2d 63 (2002) 7

Noakes v. Nat'l R.R. Passenger Corp., 363 Ill. App. 3d 851 (1st Dist. 2006) 7

1. A *Frye* analysis does not delve into the data underlying an opinion, and instead its inquiry into the factual basis for an expert's opinion is limited to broadly whether there is one. 8

Illinois Rule of Evidence 702 12

Bangaly v. Baggiani, 2014 IL App (1st) 123760 ..... 9-11, 13

Donaldson v. Cent. Ill. Pub. Serv. Co., 199 Ill.2d 63 (2002) 8-11, 13

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) 8, 13

Kane v. Motorola, Inc., 335 Ill. App. 3d 214 (1st Dist. 2002) 9, 12-13

Noakes v. Nat'l R.R. Passenger Corp., 363 Ill. App. 3d 851 (1st Dist. 2006) 10, 13

People v. Negron, 2012 IL App (1st) 101194 12

People v. Safford, 392 Ill. App. 3d 212 (1st Dist. 2009) . 9, 11-13

People v. Simmons, 2016 IL App (1st) 131300 12

Poliszczuk v. Winkler, 387 Ill. App. 3d 474 (1st Dist. 2008) 8-13

Roach v. Union Pac. R.R., 2014 IL App (1st) 132015 ... 9, 11, 13

Wiedenbeck v. Searle, 385 Ill. App. 3d 289 (1st Dist. 2008) 12

2. In summary judgment, a trial court must take as true an expert's testimony that his methodology is generally accepted. 13

Duran v. Cullinan, 286 Ill. App. 3d 1005 (2d Dist. 1997).. 13-15

Donaldson v. Cent. Ill. Pub. Serv. Co., 199 Ill.2d 63 (2002) 13-15

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)..... 14

D. Especially in the context of a motion for summary judgment, all of BNSF's criticisms of Drs. Perez's and Chiodo's testimony go to the weight of their testimony, not its admissibility..... 15

Supreme Court Rule 329 .....

Bonner v. ISP Techs., 259 F.3d 924 (8th Cir. 2001)..... 19

Donaldson v. Cent. Ill. Pub. Serv. Co., 199 Ill.2d 63 (2002) .. 18, 22

Frye v. United States, 293 F. 1013 (D.C. Cir. 1923)..... 18-20

Harbin v. Burlington N. R.R. Co., 921 F.2d 129 (7th Cir. 1990) 18

Hermesdorf v. City of Naperville, 2013 IL App (2d) 120431..... 19

Kane v. Motorola, Inc., 335 Ill. App. 3d 214 (1st Dist. 2002) 16, 20-21

Mattis v. Carlon Elec. Prods., 295 F.3d 856 (8th Cir. 2002)..... 19

Melecosky v. McCarthy Bros. Co., 115 Ill.2d 209 (1986) 19

Noakes v. Nat'l R.R. Passenger Corp., 363 Ill. App. 3d 851 (1st Dist. 2006) 23

Norfolk S. Ry. Co. v. Rogers, 270 Va. 468 (2005) 18

People v. Halligan, 2014 IL App (1st) 131466..... 19

People v. Safford, 392 Ill. App. 3d 212 (1st Dist. 2009) 16, 20

Poliszczuk v. Winkler, 387 Ill. App. 3d 474 (1st Dist. 2008).. 16, 20

State v. Alberico, 116 N.M. 156 (1993)..... 19

Walker v. Soo Line R.R. Co., 208 F.3d 581 (7th Cir. 2000)..... 19

Conclusion 24

Certificate of Compliance 25

Reply Argument

A. Summary

David Molitor appeals from an order and summary judgment in favor of the BNSF Railroad Company ("BNSF") in his negligence action against BNSF for damages under the Federal Employers' Liability Act ("FELA"), 45 U.S.C. §§ 51 *et seq.* (C. 3921, 3925). Mr. Molitor alleged his exposure to known carcinogenic toxins during his work for BNSF caused or contributed to his developing lymphoma. The trial court excluded his two experts, Drs. Hernando Perez and Ernest Chiodo, holding their testimony was inadmissible under the *Frye* standard, and then granted BNSF summary judgment, as Mr. Molitor could not prove causation without an expert (C. 3921-25).

In his opening brief, Mr. Molitor explained that in excluding Drs. Perez and Chiodo, the district court misapplied the Illinois Rule of Evidence Rule 702 and *Frye*[1] standard, especially in the context of a motion for summary judgment. Correctly applying that standard, their testimony is admissible (Brief of the Appellant ["Aplt.Br."] 24-49).

Mr. Molitor explained a *Frye* analysis only applies to new or novel scientific methodologies (Aplt.Br. 26-32), which Drs. Perez's and Chiodo's were not (Aplt.Br. 44-49). It does not make the trial court the "gatekeeper" of anything else or include an analysis of the "reliability" data underlying an expert's opinion, and the trial court here erred in holding and applying *Frye* otherwise (Aplt.Br. 28, 34). Moreover, at the

[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923)

summary judgment stage, an expert's testimony that his methodology is generally accepted must be taken as true (Aplt.Br. 36-40).

Therefore, the trial court erred in excluding Drs. Perez's and Chiodo's testimony and granting BNSF summary judgment (Aplt.Br. 44-49). Their opinions do not implicate *Frye*, as their methodologies – a historical exposure assessment for Dr. Perez, and relying on studies and extrapolation for Dr. Chiodo – are generally accepted, both as they showed and then directly testified (Aplt.Br. 44-45, 47-48). Their conclusions have sufficient foundation, which they also explained in detail (Aplt.Br. 46-47, 49). BNSF's and the trial court's concerns only go to the weight of their testimony, not its admissibility, and a jury could rely on their testimony in determining BNSF's liability and the causation of Mr. Molitor's lymphoma (Aplt.Br. 44-49).

In response, BNSF argues Mr. Molitor is seeking "to overrule Illinois law and adopt a new standard for the admission of expert testimony in which an expert witness passes muster under *Frye* and avoids any preliminary admissibility inquiry simply by applying his own rubber-stamp, that is, declaring that his methodology is reliable" (Brief of the Appellee ["BNSF.Br."] 18). But BNSF's brief – beginning with its suggestion in that very first sentence of its argument that a methodology must be shown to be "reliable" under *Frye*, rather than generally accepted – shows it is BNSF, not Mr. Molitor, who is seeking to radically change Illinois law. Instead, BNSF erroneously fails to view the facts in the light most favorable to Mr. Molitor and, either

relying on foreign authorities largely under the *Daubert* standard, and not *Frye*, argues trial courts effectively must function as factfinders when faced with a *Frye* motion to exclude at the summary judgment stage. It asks this Court to equate the admissibility of expert testimony with an opponent's preferred view of its weight.

BNSF's argument would make trial courts into the gatekeepers of more than just general acceptance of new methodologies that Illinois courts consistently have held they are not. BNSF's approach would give trial courts the power to reject expert testimony based on their assessment of the testimony's weight alone instead of its admissibility. That is not the law of Illinois. Rather, under existing Illinois law, Drs. Perez's and Chiodo's testimony readily met the *Frye* standard and was admissible. The trial court erred in concluding otherwise.

B. The FELA does not alter *Frye*'s core analysis of reliability and Mr. Molitor never argued it does; instead, as with the particular subject of expert testimony at issue in any case, the FELA's relaxed standard of causation informs whether the expert's testimony whose reliability is in question would assist the trier of fact.

BNSF concentrates its response on setting up and cutting down strawmen. The first is that Mr. Molitor "suggest[s] FELA plaintiffs are protected from summary judgment and that the FELA dilutes the criteria governing expert testimony" (BNSF.Br. 20). It cites authorities – nearly all federal, and nearly all applying the federal test of *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), rather than *Frye* –

that FELA does not change the core inquiry as to the admissibility of expert testimony (BNSF.Br. 20-22).

This misstates Mr. Molitor's argument. As he explained in his opening brief, the FELA does not in any way change the Rule 702 / *Frye* inquiry of whether (1) the opinion at issue will assist the trier of fact, (2) expert is qualified, and (3) the methodology or scientific principle on which the expert's opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs (Aplt.Br. 26, 40-44). Rather, as in any case, the standard of causation in an FELA case impacts that first question of whether the opinion would assist the trier of fact (Aplt.Br. 40-44). But it is not the case that there is "an undefined lower standard for admitting expert testimony in FELA cases" (BNSF.Br. 21). It is just that, whereas in an ordinary negligence case the expert's testimony must show proximate cause, in an FELA case the expert's testimony only needs to show some causal connection between a defendant's negligence and the plaintiff's injuries, meeting the lower standard of causation (Aplt.Br. 40-44).

BNSF's further suggestion that any part of this argument was waived is in error. As part of his argument in his opening brief, Mr. Molitor cited *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 268-69 (3d Cir. 1999) (43-44). BNSF argues that because Mr. Molitor did not cite *Hines* below, this somehow waives his invocation of the FELA's standard of causation (BNSF.Br. 21). Mr. Molitor plainly argued below in opposition to BNSF's motions to exclude and for summary judgment

that the trial court had to factor the FELA's lower standard of proof of causation into its analysis (C. 2286-87). That he did not cite *Hines* as part of that argument is immaterial. *Com. Mortg. & Fin. Co. v. Am. Nat'l Bank & Tr. Co. of Chi.*, 253 Ill. App. 3d 697, 703 (2d Dist. 1993) (failure to cite particular authority in making argument to trial court does not waive that argument on appeal).

Finally, unlike *Hines*, which was a decision applying the *Frye* standard, *all* the few decisions BNSF cites (BNSF.Br. 21-22) for its proposition that the lower causation standard under the FELA has no impact on a *Frye* analysis apply the U.S. Supreme Court's later[2] and different admissibility standard for expert testimony in *Daubert*, 509 U.S. at 579, not *Frye*. *See Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 503 (9th Cir. 1994); *Kopplin v. Wisc. Cent. Ltd.*, 914 F.3d 1099, 1101, 1104 (7th Cir. 2019); *Taylor v. Consol. Rail Corp.*, 114 F.3d 1189 (6th Cir. 1997); *Hose v. Chi. N.W. Transp. Co.*, 70 F.3d 968, 972 (8th Cir. 1995); *Schindler v. Dravo Basic Materials Co.*, 790 F. App'x 621, 624 (5th Cir. 2019); *Wills v. Amerada Hess Corp.*, 379 F.3d 32, 47 (2d Cir. 2004); *BNSF Ry. Co. v. Baca*, No. 02-17-00168-cv, 2018 WL 1528573 at *11 (Tex. App. 2018).

Decisions under *Daubert* have no applicability to Illinois' *Frye* test, because "[u]nlike the simple and open general acceptance

---

[2] *Hines* was decided in 1991, two years before *Daubert*. But in its brief, BNSF cites *Hines* as having been decided in 1999 (BNSF.Br. 43), after *Daubert*. BNSF's citation, which makes it appear *Hines* was a *Daubert* decision and not a *Frye* decision as it was, is incorrect.

requirement of *Frye*," *Daubert* imposes additional considerations not present in *Frye*. *Donellan v. First Student, Inc.*, 383 Ill. App. 3d 1040, 1057-58 (1st Dist. 2008).

The point is that in an ordinary negligence case, a causation expert unable to testify the defendant's action was a proximate cause of the injury, but instead only that it played some part in the injury, never would be admissible. In an FELA case, testimony that the action played some part in the injury is sufficient. The admissibility inquiry is not any different, but whether expert testimony assists the trier of fact in the case at issue necessarily depends on what the trier of fact is trying. BNSF's argument otherwise is in error.

C. Mr. Molitor has never argued the law of Illinois "shields expert witnesses from judicial inquiry," but especially in the face of a motion for summary judgment, the inquiry into the underlying foundation for the expert's conclusions is limited to whether, viewing the record in the light most favorable to the plaintiff, there is any articulable factual basis for the expert's conclusions.

Mr. Molitor structured his opening brief by first laying out the relevant law and then applying the facts to that law. BNSF does the opposite, structuring its argument facts-first, law later. This is telling because the law is not favorable to its position.

With only a short discussion at the beginning of what the FELA and *Frye* require, with little mention of how a *Frye* analysis works (BNSF.Br. 23-25), BNSF spends most of its argument cherry-picking Drs. Chiodo's and Perez's testimony and seeking to poke holes in their conclusions and their foundation for their conclusions (BNSF.Br. 27-

43). Mr. Molitor addresses this below at pp. 15-23. BNSF then leaves to five pages at the end of its brief its second strawman argument that Mr. Molitor somehow was suggesting the Supreme Court of Illinois' decision in *Donaldson v. Cent. Ill. Pub. Serv. Co.*, 199 Ill.2d 63 (2002), and its progeny "shield expert witnesses from judicial inquiry" (BNSF.Br. 43-47). By that point, BNSF hopes, the Court will be unimpressed with the experts' testimony and agree the trial court had the ability to decide, contrary to the summary judgment and *Frye* standards, that their testimony lacked sufficient foundation and did not use generally accepted methodologies.

To be sure, Mr. Molitor never argued the law of Illinois shields expert witnesses from judicial inquiry or that no inquiry into the foundation of an expert's testimony is permissible. Rather, he explained in detail that *Frye* bars new or novel scientific methodologies that are not generally accepted (Aplt.Br. 26-32). And at the summary judgment stage, he concluded there can be an inquiry whether the opinion's broad basis has a bare factual basis at all, though without delving into its underlying data, because Rule 702 requires that the expert testimony be able to assist the jury (Aplt.Br. 35-36) (citing *Noakes v. Nat'l R.R. Passenger Corp.*, 363 Ill. App. 3d 851, 854 (1st Dist. 2006) (observing experts in FELA case "had reasonable understandings of the nature of the work that plaintiff performed, as well as the mechanics of [his injury] and other motion related injuries from which plaintiff suffered," which was all *Frye* inquiry required)).

1. A *Frye* analysis does not delve into the data underlying an opinion, and instead its inquiry into the factual basis for an expert's opinion is limited to broadly whether there is one.

Rather, it is the extent of that judicial inquiry that is at issue. In his opening brief, Mr. Molitor explained reliability of methodology and general acceptance are not the same, nor are reliability of foundation and general acceptance, as the Supreme Court made plain in *Donaldson*. There, the Court held, "The trial court is not required to conduct a two-part inquiry into both the reliability of the methodology and its general acceptance," because this "impermissibly examines the data from which the opinion flows, while the technique remains generally accepted. Questions concerning underlying data, and an expert's application of generally accepted techniques, go to the weight of the evidence, rather than its admissibility." 199 Ill.2d at 81.

Now, seizing on the use of the word "foundation" or "reliable" in other decisions, BNSF argues that despite this plain direction from the Supreme Court in *Donaldson*, which BNSF ignores, trial courts nonetheless properly may inquire into the minutiae of the data from which an expert opinion flows, regardless of the technique used. It argues the trial court then can exclude expert testimony solely for that reason, and can do so at the summary judgment stage (BNSF.Br. 25, 44-45). For this, BNSF cites (BNSF.Br. 25, 44-45):

- *Poliszczuk v. Winkler*, 387 Ill. App. 3d 474, 483 (1st Dist. 2008), stating a trial court "examines proposed opinion testimony from a

scientific expert to determine whether it bears sufficient indicia of reliability before the testimony is submitted to the jury;"

- *Bangaly v. Baggiani*, 2014 IL App (1st) 123760, ¶ 155, stating expert testimony "must be reliable and have a proper basis for the opinion to meet foundational requirements;"
- *Roach v. Union Pac. R.R.*, 2014 IL App (1st) 132015, ¶¶ 48-55, stating a trial court must consider whether a medical expert's testimony is reliable and relevant;
- *People v. Safford*, 392 Ill. App. 3d 212, 225 (1st Dist. 2009), stating under *Frye*, "[i]t is the function of the trial court to determine whether the foundational requirements have been met;" and
- *Kane v. Motorola, Inc.*, 335 Ill. App. 3d 214, 221 (1st Dist. 2002), stating "courts may reject an expert's conclusions when their extrapolation methodologies are unsound or when the scientific data upon which they rely is not related to the conclusion reached."

None of these decisions means what BNSF wants them to. None makes the trial court the gatekeeper of the reliability of an expert opinion's underlying data that the Supreme Court rejected in *Donaldson*. (Notably, of them, only *Kane* even cites *Donaldson*.)

In *Poliszczuk*, the defendant did not object to an expert's testimony at all. 387 Ill. App. 3d at 483. Instead, this Court held it likely would have been barred and, without mentioning *Donaldson*,

noted in passing that under *Frye*, "the trial court closely examines proposed opinion testimony from a scientific expert to determine whether it bears sufficient indicia of reliability before the testimony is submitted to the jury." *Id.* There, the issue was medical testimony that the defendant's injuries were permanent. *Id.* But there was no evidence of any medical examination for more than four years before trial, which as a matter of law "was not recent enough for a conclusion that [the plaintiff]'s injuries were permanent." *Id.*

The Court in *Poliszczuk* did not run afoul of *Donaldson* and convert weight into admissibility. As in *Noakes*, it considered the broad basis of the expert's opinion. That was all that was meant by "reliability." It then observed the opinion did not have a basis recognized by law at all. In *Noakes*, the Court did the same and came to the opposite conclusion.

Bangaly supports Mr. Molitor's position, not BNSF's. There, an attorney from New Jersey was allowed to testify that a marriage was valid under Mali law, even though he had not previously analyzed the validity of a Malian marriage or studied Malian matrimonial law, because he was able to articulate "the basis for his opinion by explaining the similarities between Mali and the systems he had studied more extensively and pointed to specific sections of the Malian statutes that supported his opinions." 2014 IL App (1st) 123760, ¶¶ 161, 164. The Court held that was sufficient. *Id.* at ¶ 164. Again, as in *Poliszczuk* and *Noakes*, the Court merely looked at the broad basis of

the opinion. This is because, per *Donaldson*, questions as to the underlying data itself go to the weight of the evidence.

Roach does not help BNSF, either. As in *Poliszczuk*, the issue was whether a gap in treatment made a physician's testimony inadmissible that a plaintiff's injury, principally its exacerbation of his hypertension, was permanent. 2014 IL App (1st) 132015, ¶¶ 58-65. This Court rejected the defendant's challenge to the admission of his testimony. *Id.* As with the expert in *Bangaly*, the physician was able to articulate how he could reach his opinion even with a 17-month gap in treatment: he had been the plaintiff's treating physician for ten years and had treated him for hypertension both before and after the injury at issue. *Id.* at ¶ 65. "Therefore, the gap in treatment went to the weight to be given his testimony by the jury," not admissibility. *Id.*

In *Safford*, a criminal case, a fingerprint expert's testimony failed for the same reason as the physician's in *Poliszczuk*: the broad basis for his testimony failed a legally required element. The examiner was unable to give *any* evidentiary basis for his opinion at all. 392 Ill. App. 3d at 220-22. This was unacceptable, because "admitting expert testimony without a showing of the requisite foundation so curtails the ability of the defendant to challenge the conclusion drawn by the expert that it leads to a suggestion of infallibility." *Id.* at 223. Again, examining solely the broad basis for the opinion, there was none, so it was inadmissible. *Id.* at 223-28.[3]

[3] This Court since has criticized *Safford* as even going too far. "'*Safford* is an outlier case,' and no court since *Safford* has required that an

Finally,[4] *Kane* also supports that only if, as in *Poliszczuk* and *Safford*, an expert's broad basis for his testimony was absent of any articulable foundation is that reason to find it unreliable under Rule 702. There, the plaintiff alleged he developed a brain tumor as a result of testing a prototype antenna for a cellular telephone, and the trial court granted the defendant summary judgment. 335 Ill. App. at 216-17. On appeal, the plaintiff challenged the exclusion of two medical experts' testimony on causation. *Id.* This Court affirmed, noting the experts themselves "acknowledged in their depositions the scientific data did not support their conclusions that [the plaintiff] suffered an RF burn, which led to his development of a brain tumor," they "knew of no studies indicating an RF burn was capable of causing a brain tumor," and they "were unable to state how they extrapolated their conclusions from the scientific data upon which they relied or how the numerous dissimilar studies they cited to supported their conclusions."

---

expert disclose the specific reasons for his opinion as a prerequisite to admissibility." *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 123 (quoting *People v. Negron*, 2012 IL App (1st) 101194, ¶ 42) (rejecting *Frye* challenge to expert ballistics testimony where the expert "simply testified to the process he uses to compare bullets and his ultimate conclusion that the bullets matched," where his testimony's deficiencies could be probed on cross-examination).

[4] BNSF also cites *Wiedenbeck v. Searle*, 385 Ill. App. 3d 289 (1st Dist. 2008). *Wiedenbeck* did not involve an analysis of the admissibility of expert testimony at all. Instead, the question was whether an expert's testimony was sufficient to support proximate cause in a medical negligence case so as to avoid summary judgment. 385 Ill. App. 3d at 293-99.

Id. at 222. They also "were unable to explain what steps they took or methodologies they used to extrapolate their opinions." *Id.*

All these decisions support the plain language in *Donaldson* and *Noakes* that a *Frye* analysis does not include analyzing the underlying data for the expert's opinion. When, as in *Noakes*, *Bangaly*, and *Roach*, an expert is able to articulate a factual basis for his opinion, it is "impermissibl[e]" in a *Frye* analysis to "examin[e] the data from which the opinion flows," because "[q]uestions concerning underlying data … go to the weight of the evidence, rather than its admissibility." *Donaldson*, 199 Ill.2d at 81.

Only if, as in *Poliszczuk*, *Safford*, or *Kane*, the expert is totally unable to articulate a factual basis for his opinion, does that then render it inadmissible under Rule 702, because "the basis for the bottom-line opinion is … not subject to scrutiny by meaningful cross-examination." *Safford*, 392 Ill. App. 3d at 225. But if the expert can articulate that factual basis, any challenges the opposing party may have "would affect the weight of the evidence and the credibility of the [experts], rather than the admissibility of that testimony," and "can be adequately brought to light before the jury on cross-examination." *Noakes*, 363 Ill. App. 3d at 859.

2. In summary judgment, a trial court must take as true an expert's testimony that his methodology is generally accepted.

In his opening brief, and citing both *Duran v. Cullinan*, 286 Ill. App. 3d 1005 (2d Dist. 1997), and *Donaldson*, Mr. Molitor also

explained that when weighing a motion for summary judgment on the basis that expert testimony is inadmissible under the *Frye* standard, "an expert's sworn statement that his or her methodology is generally accepted is sufficient, and obviates further *Frye* analysis" (Aplt.Br. 36).

Mr. Molitor explained that in *Duran*, the Court held that at the summary judgment stage, a plaintiff's expert "asserting that the extrapolation method is commonly used by the scientific community as well as various federal agencies" had to be taken as true, and the trial court therefore "abused its discretion in finding that the plaintiffs' extrapolation from the studies was not a technique sufficiently established to have gained general acceptance" (Aplt.Br. 38-39) (quoting 286 Ill. App. 3d at 1013). Then, "in *Donaldson*, the Supreme Court approved of the Court in *Duran* holding that the plaintiffs' expert's sworn affidavit had to be taken as true, given the summary judgment posture" (Aplt.Br. 39) (citing 199 Ill.2d at 83-84).

BNSF argues Mr. Molitor "overstates the Second District's opinion in *Duran*," but does not show how (BNSF.Br. 45-46). The point to *Duran* is that in the context of a motion for summary judgment, the experts' testimony, too, must be viewed in the light most favorable to the plaintiff. So viewed, the experts in *Duran* stated their use of extrapolation was generally accepted and were able to articulate the factual basis for their conclusions, which the record showed, and that was sufficient. 286 Ill. App. 3d at 1013. And in *Donaldson*, the Supreme Court examined *Duran* and held the Court in *Duran* properly

"considered this issue in the context of a summary judgment motion," and in that context, "conclude[d] that the method of extrapolation is generally accepted in the scientific community." 199 Ill.2d at 84.

This makes sense. The Court's conclusion in *Duran* remains well in line with *Donaldson* and its progeny. In *Duran*, the Court looked at what the methodology was and determined, based on the expert's affidavit and how the conclusion was extrapolated, that the expert had an articulable factual basis, so summary judgment could not be granted for the defendant. And in *Donaldson*, the Supreme Court approved. The same is and must be true here.

D. Especially in the context of a motion for summary judgment, all of BNSF's criticisms of Drs. Perez's and Chiodo's testimony go to the weight of their testimony, not its admissibility.

Drs. Perez and Chiodo both were able to articulate the factual basis for their opinions, which were not speculative or conjectural, and were in the record. (BNSF accuses Mr. Molitor of omitting the Pronk study on which Dr. Perez relied from the record on appeal (BNSF.Br. 36, n.1). That is because it was not actually in the record before the trial court, so there was nothing to include. *See* Supreme Court Rule 329.)

BNSF argues Mr. Molitor "must also establish [its] actual or constructive knowledge that its conduct did not adequately protect [him] and similarly situated employees," and does not argue how he established this (BNSF.Br. 42). It argues he therefore "has forfeited the argument that he raised a triable issue of fact concerning the

railroad's conduct and actual or constructive knowledge" (BNSF.Br. 41-42).

Mr. Molitor has not forfeited anything. The trial court simply found that because it was excluding Dr. Perez's opinion, Mr. Molitor could not meet that element (C. 3923). Mr. Molitor's argument on appeal is that excluding Dr. Perez's opinion was error. That obviously includes his opinions that it was common knowledge in the railroad industry since at least 1955 that exposure to diesel exhaust carries an excess cancer risk (C. 1341-42), and BNSF did not provide Mr. Molitor adequate protective equipment to guard against diesel exhaust and herbicide exposure despite internal documentation showing it knew of these risks at the time and the importance of using this equipment to guard against them (C. 1348-49). Because the trial court erroneously excluded his opinion, this was excluded, too. It was not some separate ruling or determination.

In his opening brief, Mr. Molitor recounted Dr. Perez's methodology of a historical exposure assessment, his testimony of how it was not new or novel and it was generally accepted, and how he went about analyzing Mr. Molitor's exposures based initially on Mr. Molitor's statements and then comparing them to scientific literature and air quality data (Aplt.Br. 44-47). The foundation for his opinion was not the inarticulable lack of anything, as in *Poliszczuk*, *Safford*, or *Kane*, nor was it merely Mr. Molitor's statements, but rather it included "119 data sources, including interrogatory answers, scientific literature,

personnel file documents, BNSF's rule books, operating codes, and hazard communication programs, and reports and data from railroad air sampling tests" (Aplt.Br. 46-47). He did not rely merely on Mr. Molitor's statements, but confirmed them through Mr. Molitor's work history and then used scientific literature and data to assess exposures.

BNSF's response is essentially to cherry-pick bits of Dr. Perez's testimony and argue, "Not good enough." It criticizes his use of the Pronk framework because it concluded Mr. Molitor was in the "low" range of exposure to diesel exhaust (BNSF.Br. 36). (Though that fails to include when he was in higher ranges, and Dr. Perez explained why the "low" range still gave him an elevated risk of cancer (Aplt.Br. 7-8).) It characterizes his investigation as "conjecture" and points out what it believes was missing from his conclusions to make them incorrect (BNSF.Br. 37-38). It criticizes him for ignoring BNSF's own studies and instead using a proxy analysis (BNSF.Br. 37-38), though he explained why he did so (C. 1772-77, 1790, 1806). (Doubtless one would not fault a tobacco injury plaintiff for failing to use tobacco industry "studies.")

BNSF is in error. All its points are perhaps good arguments to make to a jury. But they do not change the fact Dr. Perez articulated the foundation for his conclusions and how he reached them, he explained his methodology, and he explained it is generally accepted and showed so through scientific literature. Each and every one of BNSF's concerns go to the weight of his testimony, not its admissibility.

Moreover, to the extent Dr. Perez began with Mr. Molitor's statements, which contrary to the summary judgment standard of review BNSF calls "self-serving" (BNSF.Br. 38), BNSF cites no authority, let alone any from Illinois, that an expert cannot rely on a plaintiff's recounting of events as a starting point for his assessment and conclusions. In his opening brief, Mr. Molitor cited *Harbin v. Burlington N. R.R. Co.*, 921 F.2d 129, 130-31 (7th Cir. 1990), as an example of it being held proper for an expert to do just that.

BNSF responds with *Norfolk S. Ry. Co. v. Rogers*, 270 Va. 468 (2005), a Virginia decision distinguishing *Harbin*. *Rogers* is inapposite. First, Virginia is not a *Frye* jurisdiction and allows inquiry into an expert's underlying data that Illinois does not. *Id.* at 479. Second, the problem in *Rogers* was not that the expert relied on the plaintiff's statements, but that even those statements did not answer what kind of exposure the plaintiff had suffered. *Id.* at 479-480. Finally, the *Rogers* court's distinguishing of *Harbin* was not that an expert could rely on a plaintiff's self-reporting, but as to sufficiency of the evidence in a jury trial: Virginia required showing the plaintiff was exposed to certain levels of a substance exceeding reasonably safe levels, and while the plaintiff in *Harbin* had done so, the plaintiff in *Rogers* had not. *Id.* at 484-86. (Of course, "Illinois law does not require that plaintiffs quantify the level of exposure." *Donaldson*, 199 Ill.2d at 91.)

In fact, countless decisions both in Illinois and nationwide have held an expert *can* rely on a plaintiff's own statements as the starting

point for formulating his opinion, and that merely goes to the weight of his testimony, not its admissibility. *See, e.g.*, *Melecosky v. McCarthy Bros. Co.*, 115 Ill.2d 209, 216 (1986) (allowing expert's testimony where only underlying basis for it was the plaintiff's statements); *People v. Halligan*, 2014 IL App (1st) 131466, ¶ 17 (that expert's testimony was based solely on party's self-reporting could be weighed by factfinder); *Hermesdorf v. City of Naperville*, 2013 IL App (2d) 120431-U, ¶ 107 (same); *see also, e.g.*, *Bonner v. ISP Techs.*, 259 F.3d 924, 931 (8th Cir. 2001) (allowing expert testimony where only worker's statements provided basis for duration and volume of toxic exposure); *Mattis v. Carlon Elec. Prods.*, 295 F.3d 856, 860-61 (8th Cir. 2002) (same); *Walker v. Soo Line R.R. Co.*, 208 F.3d 581, 586-87 (7th Cir. 2000) (reversing defense jury verdict in FELA case after exclusion of expert on basis expert relied on plaintiff's self-reporting, as that goes to weight and is subject to cross-examination); *State v. Alberico*, 116 N.M. 156, 174 (1993) (reliance on party's self-reporting goes to weight and not admissibility, and "can be cured by cross-examination addressing the point that the diagnosis is based upon what the complainant says, not upon an independent evaluation of her truthfulness").

Viewing the record in the light most favorable to Mr. Molitor, Dr. Perez's testimony that Mr. Molitor had suffered a substantial occupational exposure to diesel exhaust associated with an elevated risk of cancer, and BNSF knew or should have known of this but failed to guard against it, was admissible. It did not implicate *Frye* and had a

sufficient factual basis, and the deficiencies to which BNSF points go to its weight, not its admissibility. The trial court misapplied *Frye* in holding otherwise and erred in excluding Dr. Perez's testimony.

The same is true for Dr. Chiodo. In his opening brief, Mr. Molitor recounted Dr. Chiodo's methodology of using studies finding an association between herbicide and diesel exhaust exposure and lymphoma to corroborate his opinion based on his knowledge, training, and experience, that this was generally accepted, and it also is generally accepted that exposure to diesel exhaust and herbicide causes lymphoma (Aplt.Br. 47-48). He also recounted Dr. Chiodo's opinion that that can be extrapolated for lymphoma from studies that these carcinogens cause lung cancer, which is a generally accepted principle, too (Aplt.Br. 48). And the foundation for his testimony, too, was not the inarticulable lack of anything, as in *Poliszczuk*, *Safford*, or *Kane*, but instead was discovery, deposition transcripts, Mr. Molitor's statements and medical records, and Dr. Perez's report (Aplt.Br. 49).

BNSF performs the same cherry-picking routine with Dr. Chiodo that it did with Dr. Perez, poking holes in his statements and pointing to their drawbacks and limitations (BNSF.Br. 27-34). It points out that he did not directly examine Mr. Molitor, he could not testify as to "dose" (which Illinois does not require), he did not believe there was a medical threshold for diesel or herbicide exposure to cause lymphoma, he did not look for negative studies, he had not performed studies on lymphoma and diesel exhaust or herbicides, and points to limitations in

the studies he used (BNSF.Br. 37-30). BNSF also criticizes Dr. Chiodo's testimony that "associated with" can mean "causes" as long as there is not a confounder, and this was generally accepted, by presenting contrary language from one of the sources Dr. Chiodo identified (BNSF.Br. 30-31). It criticizes his application of the extrapolation method to get from diesel exhaust exposure causing lung cancer to it causing lymphoma (BNSF.Br. 32-33).

Once again, all of these may be good arguments for a jury, but they do not impact the admissibility of Dr. Chiodo's testimony. This is not like *Kane*, where the experts were "unable to explain what steps they took or methodologies they used to extrapolate their opinions." 355 Ill. App. 3d at 222. Dr. Chiodo articulated the foundation for his conclusions and how he reached them, he explained his methodology, and he explained it is generally accepted and showed so through scientific literature. All of BNSF's concerns – that he did not examine Mr. Molitor, he did not look for negative studies, he had not performed studies himself, his reading of the studies at issue, his application of the extrapolation method – go to the weight of his testimony, not its admissibility.

To the extent BNSF argues extrapolation was not warranted here because this is not a sufficiently "limited instance" for its use (BNSF.Br. 33, 45), BNSF is in error. First, this alone goes to the weight of Dr. Chiodo's testimony because it could be addressed through cross-examination and contrary testimony from a defense expert.

Second, in *Donaldson*, the Supreme Court found extrapolation generally accepted in cases where diseases' causes are difficult for medical science to determine. 199 Ill.2d at 85.

Here, the cause of lymphoma plainly can be difficult to determine. Dr. Chiodo testified to serious limitations in establishing causation in occupational exposure cases because of ethical and latency concerns, discussing how the only way to create direct cause-and-effect studies is to intentionally expose people to toxins, and even then there would be a limitation in the study to establish cause-and-effect relationships because of the time it takes for one to get cancer from the last exposure (C. 1521-22). The Supreme Court identified these same concerns in *Donaldson*, 199 Ill.2d at 87-89. So, even if one were to disagree with Dr. Chiodo's interpretation of the studies' use of the term "association," a question of weight in itself, Dr. Chiodo explained how he was able to use extrapolation based on his knowledge, training, and experience (C. 1525-27).

The jury is not left to "guess" by either Dr. Perez's or Dr. Chiodo's opinions "whether [Mr. Molitor] was exposed to a level of diesel exhaust and/or herbicide necessary to cause disease," as BNSF argues (BNSF.Br. 32). To the contrary, per their and Mr. Molitor's testimony, Mr. Molitor suffered a substantial exposure to diesel exhaust and herbicides, and the experts can testify that within their knowledge and experience, corroborated by scientific literature, that exposure was sufficient to cause his lymphoma. Therefore, that is a threshold

showing that Mr. Molitor was exposed to toxic levels known to cause the type of injury he suffered, which is all that is required. The holes BNSF seeks to poke in the experts' opinions "would affect the weight of the evidence and the credibility of the physicians, rather than the admissibility of that testimony," which "can be adequately brought to light before the jury on cross-examination." *Noakes*, 363 Ill. App. 3d at 859.

Finally, BNSF argues *Noakes* is distinguishable because the theory of causation there "was undisputed and unchallenged" (BNSF.Br. 47), as it involved carpal tunnel syndrome and "[n]o party disputed that carpal tunnel syndrome or carpal tunnel injuries *can* be caused by the repetitive trauma that occurs in some occupational activities." 363 Ill. App. 3d at 856 (emphasis in the original). But the issue in *Noakes*, as here, was whether the plaintiff's occupational exposures *did* cause that injury. In *Noakes*, as BNSF does here, the railroad argued the plaintiff's experts' failure to know his entire work history or the particulars of his job, meant their opinions that the exposures did cause the injury lacked sufficient foundation. *Id.* at 858-59. This Court disagreed, holding that only went to the weight of their testimony, not its admissibility. *Id.* The fact that this case involves a different occupational exposure is not a material distinction.

The trial court erred in excluding Mr. Molitor's experts, and therefore erred in granting BNSF summary judgment on Mr. Molitor's FELA claims.

Conclusion

This Court should reverse the trial court's order excluding Dr. Chiodo's and Dr. Perez's opinions and granting summary judgment to BNSF, and should remand this case for further proceedings.

Respectfully submitted,

Jonathan Sternberg, Attorney, P. C.

by /s/Jonathan Sternberg
Jonathan Sternberg, Ill. #6331607
2323 Grand Boulevard #1100
Kansas City, Missouri 64108
Telephone: (816) 292-7020
Facsimile: (816) 292-7050
jonathan@sternberg-law.com

/s/Stephen F. Monroe
Stephen F. Monroe, IL#6305823
Marc J. Bern & Partners, LLP
Cook Co. Firm No. 61789
200 W. Madison St., Ste. 2100
Chicago, IL 60606
Phone: (312) 894-7941
Email: smonroe@bernllp.com

Counsel for Plaintiff-Appellant David Molitor

Certificate of Compliance

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service, is 5,993 words.

/s/Jonathan Sternberg
Jonathan Sternberg
Attorney for Plaintiff-Appellant

Certificate of Filing and Proof of Service

I certify that on September 8, 2022, I electronically filed the foregoing brief with the Clerk of the Appellate Court of Illinois, First District, by using the Odyssey E-Filing System. Under Local Rule 22(e) and within five days of the acceptance of the electronically filed brief, I will cause five copies of the file-stamped brief to be delivered to the Clerk of the Appellate Court of Illinois, First District, via FedEx express delivery.

I further certify that on September 8, 2022, I served the foregoing brief on each of the appellee's counsel named below by e-mail:

Mr. Richard T. Sikes, Jr.
Mr. Matthew C. Jardine
Knight Nicastro Mackay LLC
200 West Adams St., Ste. 2445
Chicago, Illinois 60606
Telephone: (303) 902-8030
sikes@knightnicastro.com
jardine@knightnicastro.com

Ms. Camille S. Reifers
Boyle Brasher LLC
80 Monroe Avenue, Suite 410
Memphis, Tennessee 38103
Telephone: (901) 521-2860
creifers@boylebrasher.com

Mr. William A. Brasher
Boyle Brasher LLC
One Metropolitan Square
1010 Market Street, Suite 950
St. Louis, Missouri 63101
Telephone: (314) 321-7700
wbrasher@boylebrasher.com

Ms. Karen Kies DeGrand
Mr. Curtiss S. Schreiber
Donohue Brown Matthewson & Smyth LLC
140 South Dearborn Street, Suite 800
Chicago, Illinois 60603
Telephone: (312) 422-0900
degrand@dbmslaw.com
schreiber@dbmslaw.com

I certify that everything in this Certificate of Filing and Proof of Service is true and correct. I understand a false statement on this form is perjury and has penalties provided by law under 735 ILCS 5/1-109.

/s/Jonathan Sternberg
Jonathan Sternberg
Attorney for Plaintiff-Appellant