

STATE OF MICHIGAN

IN THE 20<sup>th</sup> CIRCUIT COURT FOR THE COUNTY OF OTTAWA  
SPECIALIZED BUSINESS DOCKET

414 Washington Street  
Grand Haven, MI 49417  
616-846-8315  
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**CITY OF HOLLAND,**

Plaintiff/Counter-Defendant,

and

**CITY OF WYOMING,**

Plaintiff,

v

**GRAND RIVER CONSTRUCTION, INC.,**

Defendant/Counter-Plaintiff/  
Third-Party Plaintiff,

and

**HARTFORD ACCIDENT AND INDEMNITY  
COMPANY, and PREIN & NEWHOF, INC.,**

Defendants,

v

**ALLIED MECHANICAL SERVICES, INC.,**

Third-Party Defendant.

**OPINION AND ORDER ON  
MOTIONS TO EXCLUDE  
PLAINTIFF'S EXPERT'S  
OPINION PER DAUBERT**

File No. 14-3899-CK

Hon. Jon A. Van Allsburg

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At the session of said court held in the Ottawa County  
Courthouse in the City of Grand Haven, Michigan,  
on the 2<sup>nd</sup> day of June, 2016

PRESENT: HON. JON A. VAN ALLSBURG, CIRCUIT JUDGE



"14003899CK"

On May 13, 2016, Grand River Construction, Inc., and Hartford Accident and Indemnity Company made a motion for the exclusion of Robert Kenney’s opinion as an expert witness under Michigan law and court rules applying the principles regarding expert witnesses articulated in *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).<sup>1</sup> That motion is denied.

### Analysis

MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Under MRE 702, the court’s role is that of a gatekeeper. *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 782; 685 NW2d 391 (2004); see *Daubert*, 509 US 579. Accordingly, “a court evaluating proposed expert testimony must ensure that the testimony (1) will assist the trier of fact to understand a fact in issue, (2) is provided by an expert qualified in the relevant field of knowledge, and (3) is based on reliable data, principles, and methodologies that are applied reliably to the facts of the case.” *People v Kowalski*, 492 Mich 106, 120; 821 NW2d 14 (2012). “MRE 702 incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in” *Daubert*, 509 US 579. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). Additionally, MRE 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

Under MRE 703, “an expert may not offer an opinion that is based on ‘facts or data in the particular case’ unless the facts or data are in evidence or will be in evidence.” *People v Yost*, 278 Mich App 341, 390; 749 NW2d 753 (2008).

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<sup>1</sup> For background information, see the court’s summary disposition opinion, issued May 31, 2016.

by virtue of the person’s knowledge, skill, experience, training, or education in the subject matter of the testimony.” *Phillips v Deihm*, 213 Mich App 389, 401; 541 NW2d 566 (1995). According to Kenney’s curriculum vitae (CV), he is a licensed professional engineer in 18 states, including Michigan (Kenney CV, 2, attached as Exhibit 4 to Brief in Support of Grand River and Hartford’s *Daubert* Motion, May 16, 2016). Kenney has been employed as an engineer since 1972, maintains many professional affiliations, and has participated in many training and certification courses (Kenney CV, 2-6). Kenney has a Master’s Degree from Florida State University (Kenney CV, 2), and has “over thirty-five years of experience in diverse structural and manufacturing failure investigations identifying the cause and improper design, fabrication or construction associated with flood, fire, lightning, explosion, earthquake, wind, soil erosion, drainage and sediment control, and moisture intrusion damage” (Kenney CV, 1). Additionally, Kenney “has designed and provided construction management for 10 MGD water and wastewater treatment facilities; 2 MGD pump stations, and 72-inch diameter pipelines and high-pressure NG distribution pipelines” (Kenney CV, 1). Accordingly, Kenney appears to have significant education and experience that would permit him to testify as an expert regarding high pressure pipelines, pipeline construction, and the collapse of the interconnect facility. And, while Grand River and Hartford seek to have Kenney barred from providing any expert testimony, their arguments stop short of claiming that Kenney lacks the qualifications to testify as an expert regarding any relevant aspect of the interconnect facility’s collapse.

Instead, Grand River and Hartford argue that numerous individual conclusions Kenney has made during the course of this litigation violate MRE 702 or 703. However, the proffering party is responsible for offering expert testimony and satisfying the requirements of MRE 702 and 703. See *Gilbert*, 470 Mich at 789. Here, plaintiffs indicate that Kenney will testify at trial regarding the looseness of the T-bolts on the Megalug restraint at the time of the interconnect facility’s collapse, the appropriateness of Grand River recommending the use of the Megalug restraint with a plain end fitting, and the possibility of a transient water pressure wave (Plaintiff’s Brief Opposing Grand River’s *Daubert* Motion, May 18, 2016, 4-9). To the extent Grand River and Hartford’s arguments concern other conclusions made by Kenney during this litigation, those arguments are irrelevant because they do not relate to opinions plaintiffs will proffer at trial.

loose at the time of the facility's collapse, Grand River and Hartford note that Kenney concluded in his report that the cause of the water leak that led to the collapse of the interconnect facility was due to "the lack of nuts being tightened or never being installed" on the Megalug restraint (Holland's Investigative Report, December 18, 2015, 11, attached as Exhibit 14 to Grand River and Hartford's Brief in Opposition to Plaintiffs' Summary Disposition Motion), and argue that conclusion was contradicted by Kenney's testimony that "supposition" was the only basis for his conclusion that the nuts were never installed (Kenney Depo, Volume III, 98, 147, attached to Grand River's *Daubert* Brief). However, Kenney's testimony that supposition supported his conclusion that some bolts were never installed on the Megalug restraint does not affect his alternative conclusion that some of the bolts were not tightened on the restraint at the time the interconnect facility collapsed. Kenney's report indicated that personal observation of the scene and the remaining T-bolts and a thorough analysis of the T-bolts used to install the Megalug restraint supported his conclusion that some of the bolts were not tightened on the Megalug restraint (Holland's Investigative Report, 3, 8). This conclusion was also supported by Timothy Rose, the foreman with Allied who was assigned a supervisory role during the construction of the interconnect facility, who testified that the Megalug restraint was hand-tightened with a plain ratchet wrench (Rose Depo, 22), and Ross Smith, a licensed professional engineer who testified that the T-bolts used with the Megalug restraint needed to be tightened to a specific torque rating, and that using a torque wrench was the simplest way to ensure the proper amount of torque was achieved (Smith Depo, 52, 54-56). Accordingly, contrary to Grand River and Hartford's arguments, Kenney's conclusion that some of the bolts were not tightened on the restraint at the time the interconnect facility collapsed was not based merely on improper supposition. Kenney's conclusions regarding the tightness of the T-bolts on the Megalug restraint appear to have been based on Kenney's qualifications in a relevant field and on reliable methodologies, as required by MRE 702. *Kowalski*, 492 Mich at 120.

Kenney also testified that because the "important note" found in the EBAA brochure regarding the Megalug restraint warned against using the Megalug restraint with a plain end fitting, Grand River never should have submitted a shop drawing seeking the use of the Megalug restraint with a plain end fitting (Kenney Depo, Volume I, 100-101, attached to Plaintiffs' Brief in Support of Motion for Summary Disposition, January 18, 2016). Grand River and Hartford

note that Kenney testified that he had not previously been asked as an expert to offer an opinion in court regarding a Megalug fitting or gasket (Kenney Depo, Volume II, 147, 149-150, attached as Exhibit 3 to Grand River's *Daubert* Brief); that he was not a mechanical engineer or a metallurgist (Kenney Depo, Volume II, 140, attached to Grand River's *Daubert* Brief); and that he was not qualified as an expert in the field of material science, in the field of mechanical contracting, in the field of general contracting in Michigan, or as an expert machinist (Kenney Depo, Volume III, 8-10, attached as Exhibit 2 to Grand River's *Daubert* Brief). Based on that testimony, Grand River and Hartford argue that Kenney was not qualified to offer an opinion about the use of a Megalug in this case (Grand River's *Daubert* Brief, 8). Additionally, Grand River and Hartford argue that Kenney's conclusion in his report that the Megalug restraint should not have been used because the EBAA literature regarding the restraint said that the restraint should not be used with plain end fittings was contradicted by Kenney's testimony that he did not perform any expert analysis regarding the propriety of the restraint for use in this case (Kenney Depo, Volume III, 18, attached to Grand River's *Daubert* Brief).

Similarly, Grand River and Hartford argue that Kenney relied on information from Rick Rockow with EBAA Iron Sales, Inc. and Shawn Shaffer, the technical director of EBAA, regarding the Megalug fitting in formulating his opinions, and that, because Rockow and Shaffer were not listed as possible witnesses, testimony from Kenney based on their statements would violate MRE 703 (Grand River's *Daubert* Brief, 11-12). Here, Kenney testified that he talked with Rockow and that Rockow told him that spun ductile iron pipe is uniform, while an iron fitting is not as uniform; that a ductile iron pipe may be softer than a ductile iron fitting; that Megalug restraints should not be used on a sloped surface; that a pipe needs to be cleaned before using a Megalug restraint; and that a Megalug restraint had not been tested with a 30" fitting (Kenney Depo, Volume I, 75-77, attached as Exhibit 16 to Grand River's *Daubert* Brief). In Kenney's report, he discussed his inspection of the T-bolts attached to the Megalug restraint, and documented that he talked with Shafer, who told him that he "determined that the reducer fitting ledge did not make a difference in the ability of the Megalugs to function properly as documented by the wedge indentations in the east side of the reducer" (Holland's Investigative Report, 8).

However, in context, Kenney's conclusion in his report that the Megalug restraint should not have been submitted for use with a plain end fitting reflected his expert opinion as a licensed professional engineer with significant experience that a material should not be used contrary to a manufacturer's warning (Kenney Depo, Volume III, 188-189, attached to Plaintiffs' Brief Opposing Grand River's *Daubert* Motion, May 18, 2016). Kenney's deposition testimony does not indicate any conclusion on this issue beyond a conclusion that Grand River violated the standard of care that would be expected in its field. Thus, contrary to Grand River and Hartford's arguments, Kenney's conclusions regarding the Megalug restraint is based on his qualifications in a relevant field and on reliable principles, as required by MRE 702. *Kowalski*, 492 Mich at 120. Also, MRE 703 only requires that the facts or data *relied on* by an expert in offering an opinion be in evidence, *Yost*, 278 Mich App at 390, and there is no indication that Kenney relied on Rockow or Shafer in offering his opinion regarding the propriety of the use of the Megalug restraint.

Regarding Kenney's testimony concerning the possibility of a transient water pressure wave, Kenney testified that to perform his water pressure analysis, he first obtained information regarding Wyoming's water system from Bob Veneklasen (Kenney Depo, Volume III, 181, attached to Plaintiffs' *Daubert* Brief).<sup>2</sup> Kenney then used software to analyze Wyoming's water system (Kenney Depo, Volume III, 182, attached to Plaintiffs' *Daubert* Brief). Kenney testified that the software he used was regularly used in the engineering business and that the software was based on classical fluid mechanics equations dating back to the 1700s and 1800s (Kenney Depo, Volume III, 182-183, attached to Plaintiffs' *Daubert* Brief). Kenney explained that he provided Nila Abubakar, a civil engineer, with the data regarding Wyoming's water system, and provided her with various scenarios to analyze regarding the system (Kenney Depo, Volume III, 184, attached to Plaintiffs' *Daubert* Brief). Abubakar performed the analysis desired by Kenney using the software, and generated a report that Kenney reviewed for accuracy (Kenney Depo, Volume III, 184, attached to Plaintiffs' *Daubert* Brief). Kenney explained that he had Abubakar use the modeling software and generate a report because she was quicker at using the software and her services were less expensive for clients (Kenney Depo, Volume III, 143-144, attached to Grand River's *Daubert* Brief).

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<sup>2</sup> The deposition transcript erroneously refers to a "Mr. VandeKlaussen."

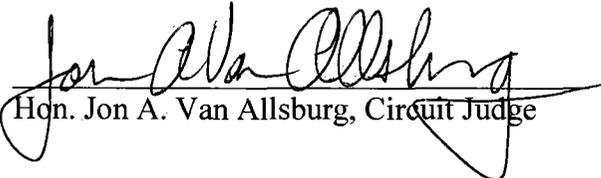
In Grand River and Hartford's brief, they argue that Kenney relied on Abubakar's "analysis and opinions," and that because Abubakar was not listed as a witness, they would not have an "opportunity to cross-examine her regarding her qualifications, the methodology she employed in her analysis and opinions, and how she carried out that analysis" (Grand River's *Daubert* Brief, 10). However, Kenney's testimony indicates that he obtained the relevant data from Veneklasen, that he dictated the use of the software, that he defined the parameters of Abubakar's use of the software, and that he reviewed Abubakar's report for accuracy. Veneklasen is listed by plaintiffs as a witness (Plaintiff's First Amended Witness List, March 31, 2015) and may provide a foundation for the admission of the data regarding Wyoming's water system, and Kenney will be able to testify regarding the remainder of the process he used to reach his conclusions regarding the existence of a transient wave. Thus, contrary to Grand River and Hartford's arguments, the record indicates that the facts or data that provide the basis for Kenney's opinion regarding the transient wave will be in evidence, satisfying the requirements of MRE 703. *Yost*, 278 Mich App at 390.

### Conclusion

For the reasons stated above, Grand River and Hartford's motions for the exclusion of Kenney an expert witness pursuant to *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993) is DENIED.

*IT IS SO ORDERED.*

Dated: June 2, 2016

  
Hon. Jon A. Van Allsburg, Circuit Judge