

CASE NUMBER: 2016-015721-CA-01

Order: - ON DEFENDANT S DAUBERT MOTION IN LIMINE REGARDING TESTIMONY AND EVIDENCE BY ALFREDO BRIZUELA Due Dat...

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CASE NAME

IVETTE HERNANDEZ ET AL VS CITIZENS PROPERTY
INSURANCE CORPORATION

DOCUMENT FILED DATE

March 24th, 2021

CASE FILING DATE

June 20th, 2016

COUNTY

Miami-dade county, FL

JUDGE

Maria de Jesus Santovenia

CATEGORY

Insurance Claim

STATUS

PJREPACT

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL
CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

CASE NO: 2016-015721-CA-01

SECTION: CA31

JUDGE: Migna Sanchez-Llorens

IVETTE HERNANDEZ et al

Plaintiff(s)

vs.

CITIZENS PROPERTY INSURANCE CORPORATION

Defendant(s)

**PLAINTIFF'S ORDER ON DEFENDANT'S DAUBERT MOTION IN LIMINE
REGARDING TESTIMONY AND EVIDENCE BY ALFREDO BRIZUELA**

THIS CAUSE came before the Court on Defendant's Daubert Motion *in limine* ("**Motion**"). The Court having reviewed the Motion, the affidavits, the deposition, the reports, having heard argument of counsel, and being otherwise advised in the Premises, it is hereby,

ORDERED AND ADJUDGED as follows:

Defendant's Motion is **GRANTED**.

This matter arises out of a claim by Plaintiffs wherein it has been alleged that Defendant breached the subject contract of insurance related to the alleged property damages at the subject property caused by windstorm.

The issue before this Court is whether Plaintiffs' expert, Mr. Alfredo Brizeula ("**Mr. Brizuela**"), Professional Engineer, can present testimony and evidence as to the wind speeds at the subject property on the purported date of loss; specifically, whether Mr. Brizuela's reliance on the subject CoreLogic report as to windspeeds on the purported date of loss is verifiable given

his sworn testimony in his deposition on October 31, 2019 (“**Deposition**”) that the CoreLogic report’s methodology is proprietary in nature and thus unverifiable.

It is Plaintiffs’ burden of proof to establish the admissibility of Mr. Brizuela’s expert opinion, and the burden must be established by a preponderance of the evidence. *See Booker v. Sumter Cnty. Sheriff’s Office/N. Am. Risk Servs.*, 166 So. 3d 189, 193 (Fla. 1st DCA 2015) (citations omitted)

Courts are to perform a gatekeeping role to prevent unreliable expert testimony from reaching the jury. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). The purpose of the gatekeeping requirement is to ensure an expert “employs in the court room the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152 (1999). carrying out this responsibility, the court has discretion and flexibility in determining what evidence is relevant, reliable, and helpful to the trier of fact. *Cabrera v. Cordis Corp.*, 134 F.3d 1418, 1420 (9th Cir.1998); *United States v. Cordoba*, 104 F.3d 225, 228 (9th Cir.1997) (“District Courts must strike the appropriate balance between admitting reliable, helpful expert testimony and excluding misleading or confusing testimony to achieve the flexible approach outlined in *Daubert*”) (quoting *United States v. Rincon*, 28 F.3d 921, 926 (9th Cir.1994)).

Under *Daubert*, the proffered testimony must be reliable, i.e., the expert's testimony must reflect scientific knowledge, the findings must be derived by the scientific method, and the work product must amount to good science. *Daubert v. Merrell Dow Pharm.*, 43 F.3d 1311, 1315 (9th Cir. 1995). In addition, the testimony must meet the “fit” requirement, i.e., “it logically advances a material aspect of the proposing party's case.” *Id.* In determining reliability, the focus is on the expert’s “principles and methodology, not on the conclusions that they generate.” *Daubert*, 509 U.S. at 580. “Scientific evidence is deemed reliable if the principles and methodology used by an expert are grounded in the methods of science.” *Clausen v. M/V New*

Carissa, 339 F.3d 1049, 1056 (9th Cir. 2003).

Furthermore, the court in *Daubert* made clear that the obligation of the court is to examine the *methodology* embraced by the expert and not to examine the conclusions. See *Daubert*, 509 U.S. at 580.

Although not an exclusive list, factors for a trial court to consider in determining reliability include: (1) whether a method can or has been tested; (2) the known or potential rate of error; (3) whether the methods have been subjected to peer review; (4) whether there are standards controlling the technique's operation; and (5) the general acceptance of the method within the relevant community. *United States v. Prime*, 431 F.3d 1147,1152 (9th Cir. 2005).

Section 90.702, Florida Statutes (2020) states as follows:

“Testimony by experts — If scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion or otherwise, if:

- (1) The testimony is based upon 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.

§ 90.702, Fla. Stat.

Under *Daubert*, “the subject of an expert’s testimony must be ‘scientific knowledge.’” *Daubert*, 509 U.S. at 590, “[I]n order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method.” *Id.* The touchstone of the scientific method is empirical testing—developing hypotheses and testing them through blind experiments to see if they can be verified. *Id.* at 590; see also Black’s Law Dictionary 1465--66 (9th ed. 2009) (“[S]cientific method [is][a]n analytical technique by which a hypothesis is formulated and then systematically tested through observation and experimentation.”). As the United States Supreme

Court explained in *Daubert*, "[t]his methodology is what distinguishes science from other fields of human inquiry." *Id.* at 593. Thus, a key question to be answered in any *Daubert* inquiry is whether the proposed testimony qualifies as "scientific knowledge" as it is understood and applied in the field of science to aid the trier of fact with information that actually can be or has been tested within the scientific method. "General acceptance" [from the *Frye* test] can also have a bearing on the inquiry, as can error rates and whether the theory or technique has been subjected to peer review and publication. *Id.* at 593-594. Subjective belief and unsupported speculation are henceforth inadmissible. *See Id.* at 590.

Here, as testified to during his deposition, Mr. Brizuela admitted that not only was he unable to identify the methods by which CoreLogic measures wind speeds, as this information is proprietary in nature (disclaimed), but that what he does know about CoreLogic's methodology is that it runs contrary to what is deemed acceptable within the relevant scientific community.

Furthermore, Mr. Brizuela has failed to satisfy the reliability test described herein above. Specifically, he cannot verify whether CoreLogic's method has been tested, nor is he aware of the known or potential rate of error, nor is he privy to CoreLogic's methods and whether or not they have been subjected to peer review, nor can opine as to whether there are standards controlling the technique's operations as CoreLogic's methodology is proprietary in nature.

Moreover, once the trial court has determined that the moving party has made a timely, proper and facially sufficient by putting opposing counsel on notice so as to have an opportunity to address any perceived defect in the expert's testimony, the burden is on the non-moving party, i.e., Mr. Brizuela, to provide a proper foundation for his expert testimony. *Tanner v. Westbrooke*, 174 F.3d 542, 546 (5th Cir. 1999), *superseded in part by rule on other grounds in Mathias v. Exxon Corp.*, 302 F.3d 448, 459 n.16 (5th Cir. 2002).

Here, as the moving party, Defendant places Plaintiffs on notice of Mr. Brizuela's

testimony's perceived defects, and, despite same, Plaintiffs failed to satisfy its burden by a preponderance of evidence of coming forward with a proper foundation for his expert testimony.

The Court having reviewed the evidence presented, finds that Mr. Brizuela's testimony as it relates to wind speeds at the subject property would not assist the trier of fact and that his methodology is not sufficiently reliable. As such, Mr. Brizuela is precluded from giving any expert testimony regarding the wind speeds at the subject property on the purported date of loss as the CoreLogic report he relies upon and the methodology by which they calculate the data therein cannot be verified, as is required by the court under *Daubert*, thus deeming the testimony unreliable.

DONE and ORDERED in Chambers at Miami-Dade County, Florida on this 24th day of March, 2021.

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Hon. Migna Sanchez-Llorens

CIRCUIT COURT JUDGE

Electronically Signed

No Further Judicial Action Required on **THIS MOTION**

CLERK TO **RECLOSE** CASE IF POST JUDGMENT

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