DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

UNIVERSAL PROPERTY & CASUALTY INSURANCE COMPANY,
Appellant,

v.

EDWARD NAVLEN and **SAUNEE NAVLEN,**
Appellees.

No. 4D2022-1590

[September 20, 2023]

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; G. Joseph Curley, Jr., Judge; L.T. Case No. 502021CA003962.

Paulo R. Lima and Elizabeth K. Russo of Russo Appellate Firm, P.A., Miami, for appellant.

George A. Vaka and Robert C. Hubbard of Vaka Law Group, P.L., Tampa, and Jeffrey D. Groover and Ardalan Montazer of Kanner & Pintaluga, P.A., Boca Raton, for appellees.

KUNTZ, J.

Universal Property & Casualty Insurance Company appeals a final judgment after a jury found for its insureds. Universal raises two issues on appeal. First, Universal argues the circuit court erred in refusing to enter judgment in Universal's favor based on the insureds' failure to submit a sworn proof of loss. Second, Universal argues the circuit court erred in admitting the insureds' expert's testimony. We affirm the first issue without discussion. But, on the second issue, we agree with Universal, reverse the circuit court's final judgment, and remand for a new trial.

i. Background

On January 4, 2021, Horizon Public Adjusters reported a wind damage claim on the insureds' behalf to Universal, listing August 1, 2020 as the date of loss. Universal responded and requested a proof of loss, a repair

estimate, any repair receipts, and attached the portion of the policy that included the proof of loss requirement.

In response, Horizon sent Universal a preliminary estimate and photos. After inspecting the property, Universal sent the insureds a letter partially denying coverage and otherwise declining to pay, as the loss was below the policy deductible. The insureds paid for a new roof and sued Universal.

Our focus in this opinion is on the insureds' expert. Before trial, Universal moved to exclude the insureds' expert, claiming it had requested the expert's report multiple times but had not received the report, in violation of a pretrial order. The insureds argued they had disclosed the expert in advance but acknowledged they only had provided the expert's report at the pretrial hearing. Rather than striking the testimony, the circuit court allowed Universal to take the expert's deposition before trial.

After taking the expert's deposition, Universal objected to the admissibility of the expert's testimony. Universal argued, among other things, that the expert: (i) did not inspect the roof before it was replaced; (ii) formed opinions based on inspecting neighboring adjoining roofs; (iii) took no position about the percentage of the roof that was damaged; (iv) said the wind speeds were 60–70 mph but indicated those measurements were taken over 17 miles away from the property; (v) based his opinion on "Benchmark" data that was not included in his report and based on an algorithm; and (vi) could not rule out other potential causes.

The trial court rejected Universal's objections to the admissibility of the expert's testimony.

ii. Analysis

Expert testimony is governed by section 90.702, Florida Statutes (2021). Section 90.702 codifies the *Daubert*[1] standard and requires that expert testimony (1) be "based upon sufficient facts or data"; (2) be "the product of reliable principles and methods"; and (3) show that the expert "applied the principles and methods reliably to the facts of the case." *Id.*

To determine the reliability of an expert's opinion, *Daubert* outlined a list of non-exhaustive, non-mandatory factors to consider, including "(1) 'whether [the] theory or technique . . . can be (and has been) tested'; (2) 'whether the theory or technique has been subjected to peer review and

[1] *Daubert v. Merrel Dow Pharms., Inc.*, 509 U.S. 579 (1993).

publication'; (3) 'in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error'; and (4) 'general acceptance.'" *Daniels v. State*, 312 So. 3d 926, 933 (Fla. 4th DCA 2021) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593-95 (1993)).

The trial judge serves as a gatekeeper to ensure all expert testimony is reliable. *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 988–89 (5th Cir. 1997) (citing *Daubert*, 509 U.S. at 589). But the analysis focuses "'solely on principles and methodology, not on the conclusions that they generate.'" *Watkins*, 121 F.3d at 989 (quoting *Daubert*, 509 U.S. at 594–95).

Universal challenges the principles and methodology of the insureds' expert on many grounds. We focus on two.

First, the expert relied on "Benchmark" data to support his conclusion. The only attempt to establish that data's credibility was the expert's assertion that he "uses it all the time." The insureds did not provide any testimony that Benchmark's wind speed data had been tested, was subject to peer review or publication, the potential error rate, or the existence of maintenance standards. *See Daubert*, 509 U.S. at 593–94. Unlike other cases with similar data, here the expert did not provide any support or independent corroboration for his data's reliability. *See, e.g.*, *Marquez v. Nat'l Fire & Marine Ins.,* No. 20-CV-22791, 2022 WL 7312550, at *4 (S.D. Fla. Oct. 13, 2022). More is required than an expert stating a test is reliable because they use it.[2]

Second, the expert testified that "more than 25%" of the insureds' roof was damaged. But the expert did not conduct any calculation or use any other method to determine the roof percentage that was damaged. Without any calculation or basis for the conclusion, the expert merely "guestimated" based on reviewing roof photos. An expert may rely on their experience or personal knowledge, but the expert must explain "how that experience le[d] to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience [was] reliably applied to the facts." *MCFS & BB, Inc. v. Hartford Ins. Co. of the Se.*, No. 3:21-CV-254-MMH-MCR, 2022 WL 2818107, at *2 (M.D. Fla. July 19, 2022) (quoting *United States v. Frazier*, 387 F.3d 1244, 1261 (11th Cir.

[2] Counsel for the insureds argued they "googled" Benchmark and concluded it was reliable. But the trial court rejected this argument and accepted the expert solely based on the expert's testimony.

2004)); *Baan v. Columbia County*, 180 So. 3d 1127, 1133 (Fla. 1st DCA 2015).

Here, the expert did not attempt to explain his conclusion. Instead, he said "there[] [was] no calculation," and that a calculation would have "require[d] [him] to calculate a specific percentage, which [he was] not required to do." He may not have been required to calculate a specific percentage, but "a 'court's gatekeeping function requires more than simply taking the expert's word for it.'" *Royal Caribbean Cruises, Ltd. v. Spearman*, 320 So. 3d 276, 290 (Fla. 3d DCA 2021); *Sanchez v. Cinque*, 238 So. 3d 817, 823 (Fla. 4th DCA 2018).

iii. Conclusion

We affirm the trial court's order in part. But we reverse the court's order denying Universal's motion to strike the insureds' expert witness and remand for a new trial.

Affirmed in part, reversed in part, and remanded.

DAMOORGIAN and LEVINE, JJ., concur.

* * *

Not final until disposition of timely filed motion for rehearing.