

## **11th Circuit Reaffirms 'Considerable' Deference to District Courts' Daubert Rulings**

*Product Liability Advisory*

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The 11th Circuit Court of Appeals, in *Kilpatrick v. Breg, Inc.*, No. 09-13813 (11th Cir. Aug. 12, 2010), recently reaffirmed the broad discretion of district courts in ruling on *Daubert* issues, and the appellate court's "considerable" deference to those rulings.

The plaintiff, Douglas Kilpatrick, sued Breg, Inc. for injuries he suffered from a pain pump manufactured by Breg. The pump was used to alleviate pain after shoulder surgery, and the catheter of the pump was implanted within the joint space (intra-articularly). Two years later, Kilpatrick was diagnosed with glenohumeral chondrolysis – a complete breakdown of the cartilage in his shoulder – and needed a total shoulder replacement (and would need future surgeries). He sued Breg on theories of strict liability and negligence.

The plaintiff's only expert opined that the use of intra-articular pain pumps to dispense anesthetic directly to the shoulder joint can cause glenohumeral chondrolysis, and that the use of the pump in this manner caused Kilpatrick's injuries. Breg filed a motion to exclude this testimony and a motion for summary judgment on the ground that Kilpatrick had not demonstrated causation. The district court granted the motions and dismissed the case, finding that (1) the medical literature did not reliably support the expert's general causation opinion, (2) the expert did not reliably consider the true background risk for glenohumeral chondrolysis, (3) the expert's concessions about the hypothetical and speculative nature of the medical science on the cause of chondrolysis seriously undermined the reliability of his methodology, (4) the expert's use of "differential diagnosis" methodology to determine specific causation was flawed because it presumed the existence of general causation, and (5) the doctor's opinion on specific causation was improperly based solely on a temporal relationship between the use of Breg's pain pump and Kilpatrick's injuries.

The 11th Circuit reviewed all of the evidence and affirmed. It stressed the "considerable leeway" given a district court in executing its duty under *Daubert*, "even though a ruling on the admissibility of expert evidence may be outcome determinative," and pointed out the particular applicability of the abuse-of-discretion standard to *Daubert* issues:

We have previously held that the abuse of discretion standard allows a range of choice for the district court, so long as that choice does not constitute a clear error of judgment. The size of that range – particularly when dealing with evidentiary issues – is significant, and we defer to a district court's evidentiary rulings to a considerable extent. In particular, the abuse of discretion standard "thrives" when addressing *Daubert* issues. Given the facts of this case, the law of this [c]ircuit, and particularly in light of the deferential standard of review afforded district courts in these cases: "the heavy thumb – really a thumb and a finger or two – that is put on the district court's side of the scale," the court concludes that it was not an abuse of discretion to exclude the expert opinion of [the expert] in this case. Slip op. at 28-29 (citations and internal quotation marks omitted).

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