

United States Court of Appeals
For the Eighth Circuit

No. 18-2780

In re: Wholesale Grocery Products Antitrust Litigation

JFM Market Corp.; MJF Market Corp.

Plaintiffs - Appellants

v.

SuperValu, Inc.

Defendant - Appellee

C&S Wholesale Grocers, Inc.

Defendant

Appeal from United States District Court
for the District of Minnesota

Submitted: October 15, 2019

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[Published]

Before COLLOTON, BEAM, and KELLY, Circuit Judges.

BEAM, Circuit Judge.

JFM Market Corp. and MJF Market Corp. (collectively, “Village Market”) appeal from the district court’s¹ order granting SuperValu, Inc.’s motion to exclude expert testimony, motion for summary judgment, and its denial of Village Market’s motion seeking class certification in this ongoing multidistrict litigation.² We affirm.

I. BACKGROUND

Village Market, Massachusetts corporations that operate supermarkets in the Greater Boston area, sued SuperValu and C&S Wholesale Grocers, Inc., for antitrust violations under the Sherman and Clayton Acts, 15 U.S.C. §§ 1, 15. Plaintiffs in this multidistrict litigation are retail grocers who, in 2009, alleged SuperValu and C&S, two of the largest grocery product wholesalers (measured by sales volume) in the United States, conspired by way of an Asset Exchange Agreement (“AEA”) to allocate territory and customers.

¹The Honorable Ann D. Montgomery, United States District Judge for the District of Minnesota.

²During the course of this multidistrict litigation, class certification was granted for five distribution-center based classes of plaintiffs in the Midwest. In re Wholesale Grocery Prods. Antitrust Litig., No. 09-MD-2090, 2016 WL 4697338, at *9-13 (D. Minn. Sept. 9, 2016). Class certification was denied, however, for the proposed New England class as to C&S Wholesale Grocers, Inc., because C&S’s upcharges in New England varied widely among customers, and thus the court held that the New England plaintiffs lacked the ability to prove class-wide impact through common evidence. In re Wholesale Grocery, No. 09-MD-2090, 2012 WL 3031085, at *9-14 (D. Minn. July 25, 2012). As noted by the district court, Village Market’s claim against SuperValu is the sole remaining claim in this litigation because an arbitration agreement prevents Village Market from litigating claims against C&S.

SuperValu was C&S's largest competitor in New England, where C&S was the primary wholesaler. However, C&S did not compete with SuperValu in the Midwest, where SuperValu's main competitor was Fleming Companies (Fleming). In 2003, Fleming declared bankruptcy and C&S announced its intention to acquire Fleming's Midwest wholesale grocery distribution business, which would have resulted in C&S becoming SuperValu's major competitor in the Midwest. As a result of this impending shift in the market, C&S and SuperValu entered into the AEA at issue here, which provided that SuperValu would receive Fleming's Midwestern operations, and in turn, SuperValu would transfer its New England operations to C&S. The AEA included reciprocal non-compete provisions. The class plaintiffs alleged that the elimination of competition between SuperValu and C&S in regional markets by way of this AEA allowed each defendant to charge supra-competitive prices to their retail customers. They alleged this conspiracy to allocate territory and customers injured their business and property, and they sought treble damages and attorney's fees.

The district court resolved the instant case by granting summary judgment in favor of SuperValu, after the district court granted SuperValu's motion to exclude Village Market's proposed expert's testimony. In support of its claim, Village Market offered the expert opinion of economist Dr. Levy to establish the antitrust injury caused by the AEA; i.e., evidence from which a jury could reasonably infer that C&S's prices were supra-competitive as a direct result of the AEA. The district court held that the competitive benchmark selected by Dr. Levy was unreliable. To demonstrate how Village Market's costs would have changed over time without the AEA, Dr. Levy selected as a benchmark Stop & Shop, the largest retail grocery chain in New England and C&S's largest purchaser of wholesale groceries. Levy opined that Stop & Shop, although not an independent grocer and much larger than the class plaintiffs, served as a reliable and relevant benchmark, not as a direct comparable, but as a reference regarding the *change* in price that it paid as a reasonable reflection of

the change in the price paid by the independent grocers absent the AEA. According to Levy, Stop & Shop's size and its ability to self supply limited the impact of any increased market power obtained by C&S through the AEA.

The district court found Levy's benchmark analysis unreliable because it was premised on what the court found to be an unfounded assumption that independent retailers' charges, including Village Market's, followed the same pattern as Stop & Shop's absent the AEA. Too, the district court held that Dr. Levy failed to control for non-conspiratorial factors as required to demonstrate antitrust impact. Village Market challenges each of the district court's conclusions on appeal.

II. DISCUSSION

A. Expert Testimony

Our review of the district court's decision regarding the admissibility of expert witness testimony is for an abuse of discretion. Barrett v. Rhodia, Inc., 606 F.3d 975, 980 (8th Cir. 2010). "We will not reverse a district court's ruling on the admissibility of expert testimony 'absent a clear and prejudicial abuse of discretion.'" Id. (quoting Ahlberg v. Chrysler Corp., 481 F.3d 630, 635 (8th Cir. 2007)); Synergetics, Inc. v. Hurst, 477 F.3d 949, 956 (8th Cir. 2007) ("Decisions concerning the admission of expert testimony lie within the broad discretion of the trial court, and these decisions will not be disturbed on appeal absent an abuse of that discretion." (quoting Peitzmeier v. Hennessy Indus., Inc., 97 F.3d 293, 296 (8th Cir. 1996))). Federal Rule of Evidence 702 provides:

A witness who is qualified as an expert by knowledge, skills, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts

or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

“When considering expert testimony, a district court must ensure that ‘all scientific testimony is both reliable and relevant.’” Barrett, 606 F.3d at 980 (quoting Marmo v. Tyson Fresh Meats, Inc., 457 F.3d 748, 757 (8th Cir. 2006)). “A district court has great latitude in determining whether expert testimony meets the reliability requisites of Rule 702.” Craftsmen Limousine, Inc. v. Ford Motor Co., 363 F.3d 761, 776 (8th Cir. 2004). “To satisfy the reliability requirement, the proponent of the expert testimony must show by a preponderance of the evidence both that the expert is qualified to render the opinion and that the methodology underlying his conclusions is scientifically valid.” Marmo, 457 F.3d at 757-58.

The inquiry as to the reliability and relevance of the testimony is a flexible one designed to “make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999). “To show that the expert testimony is relevant, the proponent must show that the reasoning or methodology in question is applied properly to the facts in issue.” Marmo, 457 F.3d at 758. A court should not admit opinion evidence that “is connected to existing data only by the *ipse dixit* of the expert.” Gen. Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997). “[C]onclusions and methodology are not entirely distinct from one another.” Id. “When the analytical gap between the data and proffered opinion is too great, the opinion must be excluded.” Marmo, 457 F.3d at 758.

Directly at issue in the instant case is the district court’s exercise of its gatekeeping role. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 589 (1993). “In exercising [its] gatekeeping function, the trial court must first make a ‘preliminary

assessment of whether the reasoning or methodology underlying the [proposed expert] testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue,’ focusing specifically on the methodology and not the conclusions.” Synergetics, Inc., 477 F.3d at 955 (quoting Daubert, 509 U.S. at 592-93). “Under Daubert, ‘any step that renders the analysis unreliable renders the expert’s testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.’” Dodge v. Cotter Corp., 328 F.3d 1212, 1222-23 (10th Cir. 2003) (alteration omitted) (quoting Mitchell v. Gencorp Inc., 165 F.3d 778, 782 (10th Cir. 1999)).

The district court in this matter was especially cognizant of its role as gatekeeper in its evaluation of Dr. Levy’s proffered expert testimony, fully recognizing that rejection of expert testimony is the exception rather than the rule. Indeed, cases are legion that under Daubert, liberal admission is prevalent, Johnson v. Mead Johnson & Co., LLC, 754 F.3d 557, 562 (8th Cir. 2014), and “[c]ourts should resolve doubts regarding the usefulness of an expert’s testimony in favor of admissibility.” Marmo, 457 F.3d at 758. To be sure, however, there is a gatekeeping role to play. Daubert, 509 U.S. at 589; see also Joiner, 522 U.S. at 142. Expert testimony is inadmissible if it is speculative, unsupported by sufficient facts, or contrary to the facts of the case. Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1057 (8th Cir. 2000).

The district court’s analysis at the summary judgment stage, as here, is paramount, as “we require district courts to rely only on admissible evidence at the summary judgment stage.” In re Zurn Pex Plumbing Prods. Liab. Litig., 644 F.3d 604, 613 (8th Cir. 2011). “Because summary judgment ends litigation without a trial, the court must review the evidence in light of what would be admissible before either the court or jury.” Id. However, no matter that a determination regarding the admissibility of expert testimony might be outcome determinative at this stage, our review gives deference to the district court under an abuse of discretion standard.

Joiner, 522 U.S. at 142-43 (explaining that we may not subject the ruling to “a more searching standard of review” because it was “outcome determinative”).

A thrust of Village Market’s argument on appeal is that because Dr. Levy’s qualifications were not questioned and benchmarking is a recognized tool for proving antitrust injury, once Dr. Levy selected a benchmark there was nothing left for the district court to review under Daubert on these facts. Village Market repeatedly argues that any analytical flaws critically discussed by the district court in its analysis of Dr. Levy’s report regarding the bases he used (or omitted) to validate his Stop & Shop benchmark, are questions of fact for the jury and the court erred in failing to present them to the jury. This line of reasoning, however, is contrary to precedent supporting the Daubert analyses required of the district court at this juncture. In re Zurn Pex Plumbing, 644 F.3d at 613. The nature of the instant dispute is not factual. Village Market relies, in part, on Apple Inc. v. Motorola, Inc., 757 F.3d 1286, 1314 (Fed. Cir. 2014), to highlight the fact that a court can overstep its gatekeeping role and weigh facts. That is true, to be sure. This matter, however, stands in contrast to Apple because it is the foundation of the assumption underlying the application of the method employed by Dr. Levy on these facts—attempting to demonstrate a relationship between Stop & Shop and independent grocers—that led the district court to its conclusion that Levy’s testimony should be excluded under Rule 702. This was an appropriate exercise of the court’s gatekeeping role under Daubert. 509 U.S. at 595; Concord Boat, 207 F.3d at 1056-57.

Our task is to discern whether the district court abused its discretion. The district court did not go “miles beyond” its appropriate role in this case, as Village Market argues, but rather held that the reasoning underlying Dr. Levy’s testimony was not on solid footing because the assumption upon which the report relied was insufficient to validate his opinion. By requiring a demonstrated foundation for the opinion itself, the district court did not engage in its own weighing or assessment of

the correctness of Levy's opinion, nor did it accept one expert's analysis over another under the guise of questioning reliability as Village Market argues.

The record supports this conclusion. The district court did not refute the *method* employed as a matter of course, nor question Levy's conclusions, as Village Market claims, but carried out its obligation to discern whether this particular methodology and reasoning, as it was being applied to these facts, passed muster. The court did not abuse its discretion. Although Levy conducted regression analyses to control for the effect of Stop & Shop's size, and professed to demonstrate correlations between Village Market and Stop & Shop over time, the district court held that ultimately these analyses were a house of cards of sorts and our own analysis reveals no abuse of discretion in this conclusion. At its base level, the core assumption of the analysis was by the *ipse dixit* of Dr. Levy. Kumho Tire Co., 526 U.S. at 157 (“[N]othing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.” (quoting Joiner, 522 U.S. at 146)).

Village Market persists that Levy's extensive work demonstrated retailer prices, damage periods, and various controls, including his use of the CoD/CoG statistic and market-based approach, as well as recognized industry support in utilizing a benchmark model. On appeal, Village Market recites and analyzes the data Dr. Levy used to support his opinion that it is Stop & Shop's size and its ability to self-supply that renders it a reliable benchmark. The district court, however, thoroughly reviewed the evidence, data and compiled reports and concluded those assertions fell short of incorporating all aspects of the relevant markets to demonstrate the veracity of the benchmark chosen. Just stating that Stop & Shop is impervious to the anti-competitive actions challenged in this case and reviewing certain correlations during the damage period is not enough. There was too great an analytical gap between the facts of the case and the benchmark chosen by Levy to support his opinion that the prices paid by independent grocers and Stop & Shop

would move in tandem but for the AEA, and likewise that divergence in those prices demonstrates antitrust injury or impact. Joiner, 522 U.S. at 146; Craftsmen Limousine, 363 F.3d at 776-77; Concord Boat Corp., 207 F.3d at 1055-57.

The district court also criticized Levy's failure to control for non-conspiratorial factors as well as factors that were unique to Stop & Shop specifically—an independent basis for the district court's exclusion of this expert report and testimony. As an example, the district court highlighted Levy's failure to account for a reduction of Stop & Shop's upcharges by C&S following a 2005 contract, the effect of inflation in light of how the compared entities had previously negotiated and paid for their goods with C&S, and finally discussed Levy's inability to distinguish allegedly unlawful conduct from the unequal sharing of efficiencies that might have resulted from the AEA. In response, Village Market claims that the court should have *assumed* that all factors affected the comparators equally *unless* there was proof that the factor at issue affected Stop & Shop and not Village Market. This argument, however, misses the mark. It is the plaintiffs' burden to establish the reliability of the posited expert testimony, including a determination of whether other factors affected the pricing at issue, if only to eliminate those factors, specifically using the relevant data and time frame presented. Craftsmen Limousine, 363 F.3d at 777. Stating that a benchmark controls for *all* factors does not make it so, without more than was presented on these facts. The district court makes no such assumptions as gatekeeper and did not abuse its discretion in requiring more in order to admit Dr. Levy's testimony.

At bottom, the district court's analysis is supported by the record and properly reflects the district court's gatekeeping function mandated by Daubert and Rule 702. Given the court's finding that Levy failed to incorporate economic realities and that the assumption underlying his model was insufficiently validated, the foundation of Dr. Levy's opinion was ultimately speculative. This analysis by the court was not "manifestly erroneous" and the district court did not abuse its discretion. See

Concord Boat Corp., 207 F.3d at 1057 (reversing a judgment post-trial because the verdict rested on expert testimony that did not incorporate all aspects of the economic reality and record facts); Joiner, 522 U.S. at 142 (holding that under the abuse of discretion standard the appellate court will not reverse unless the ruling is manifestly erroneous). Having reviewed the record, we are satisfied that the district court acted within the bounds of discretion in excluding Dr. Levy's expert report and testimony in this matter.

B. Summary Judgment

This court reviews a grant of summary judgment de novo, viewing the facts in the light most favorable to the nonmoving party. Pearson v. Logan Univ., 937 F.3d 1119, 1124 (8th Cir. 2019). Exercising its gatekeeping function under Daubert, the district court excluded Levy's report, which the court held left Village Market with insufficient evidence to show injury in the form of supra-competitive prices as required under the Clayton Act. Village Market argues that even accepting the Daubert ruling of the district court, there remains sufficient evidence to allow a jury to infer anticompetitive harm, including evidence from the AEA itself of a divided market, which Village Market alleges is a per se violation of antitrust laws. Village Market highlights evidence of market concentration that it claims leads to an obvious inference of harm for New England customers. Additionally, Village Market points out that not until faced with "imminent competition" did C&S offer Village Market a reduction in its upcharge rate; powerful evidence, claims Village Market, that the previous price was well above the competitive price. According to Village Market, this evidence, at the very least, creates a jury question of fact as to an antitrust injury.

Absent Dr. Levy's expert testimony and report there remains insufficient admissible evidence to support Village Market's antitrust injury as a result of the AEA and we affirm the district court's grant of summary judgment in favor of SuperValu on that basis. Even assuming the existence of a genuine fact issue

regarding the relevant markets and market concentration, there is insufficient evidence to create an issue of fact as to whether the alleged antitrust violation was a material and substantial factor causing Village Market's alleged injuries. Absent admissible evidence regarding what Village Market's monthly and trending costs would have been but for the alleged antitrust conspiracy, no conclusions or inferences can be drawn by a factfinder on causation or the injury incurred. Concord Boat Corp., 207 F.3d at 1055 ("Antitrust injury, causation, and damages all are necessary parts of the proof [of liability under the Sherman Act] because 'Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.'" (quoting Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 n.14 (1972))). Village Market nearly concedes as much by responding to SuperValu's argument in support of summary judgment, in part, by relying on evidence from Dr. Levy's now-excluded report. We agree with the district court that Village Market has not produced evidence from which a jury could reasonably infer that C&S's prices were supra-competitive. A de novo review supports the district court's grant of summary judgment in favor of SuperValu.

C. Class Certification

Having affirmed the district court's grant of summary judgment in favor of SuperValu, we need not address on appeal Village Market's challenge to the district court's denial of its motion to reconsider class certification, as the question is moot. However, even if not moot, we affirm the district court's denial of that motion, as it is also a matter within the court's broad discretion. In re Zurn Pex Plumbing, 644 F.3d at 616. This broad discretion extends to requests, as here, to reconsider a prior class certification denial. Brown v. Nucor Corp., 785 F.3d 895, 901 (4th Cir. 2015). A district court abuses its discretion in this context only if it "rests its conclusion on clearly erroneous factual findings or if its decision relies on erroneous legal conclusions." Wedow v. City of Kansas City, Mo., 442 F.3d 661, 676 (8th Cir. 2006) (quoting Layton v. Elder, 143 F.3d 469, 472 (8th Cir. 1998)). Although Village Market argues that the deferential

standard is markedly unfair here, as *these* plaintiffs' certification arguments on their merits have yet to be heard, the district court did not abuse its discretion in finding otherwise. Without Levy's model, and given the district court's years-long and thorough review of the evidence in these matters, we find the district court did not err in denying the motion to reconsider its previous denial.

III. CONCLUSION

For the reasons stated herein, we affirm.
