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## Georgia Supreme Court Upholds Strict Interpretation of the Georgia *Daubert* Statute

The Georgia Supreme Court's recent decision in *HNTB Georgia, Inc. v. Hamilton-King*,<sup>1</sup> outlines the high standard to which Georgia courts will be held in assessing the qualifications of a party's "expert." In *HNTB*, the Court upheld a trial court's exclusion of an expert's testimony based on the court's determination that he lacked the education and experience to testify about construction defect standards. This decision will provide construction litigants with grounds upon which to challenge the opposing sides' experts and should serve as a word of caution to those litigants who do not perform their due diligence in retaining a qualified expert.

*HNTB* involved negligence claims of two individuals, Lakeisha Hamilton-King and Justin Hamilton (the Hamiltons) against HNTB Georgia, Inc. (HNTB). The Hamiltons had suffered physical injuries stemming from an accident in a bridge construction zone on Interstate 95 in south Georgia, in which their brother Johnny was killed. The Hamiltons sued HNTB, the designer of the bridge-widening project, and Plant Improvement Company d/b/a Seaboard Construction Company (Seaboard), alleging, among other things, that they had failed to include shoulders in their traffic control plans and failed to implement proper lighting in the construction zone.

The Hamiltons offered an expert to attest to the negligence of HNTB and Seaboard in the design and maintenance of the construction zone. Prior to trial, HNTB and Seaboard moved to exclude the expert's testimony, arguing that his testimony failed to meet the reliability requirements of O.C.G.A. § 24-9-67.1. The trial court granted their motions and subsequently granted HNTB and Seaboard's motions for summary judgment, based on the lack of admissible expert testimony establishing the standard of care and breach thereof by HNTB and Seaboard.

The Court of Appeals reversed the trial court's decision, concluding that the trial court abused its discretion by excluding the testimony based on what the Court of Appeals perceived as too "rigid" an application of the *Daubert* standard, which outlines certain factors relevant in determining the reliability/admissibility of expert testimony.<sup>2</sup> The *Daubert* standard examines reliability "through consideration of many factors, including whether a theory or technique can be tested, whether it has been subjected to peer review and publication, the known or potential rate of error for the theory or technique, the general degree of acceptance in the relevant scientific or professional community, and the expert's range of experience and training."<sup>3</sup>

The Supreme Court reversed the Court of Appeals' holding, noting that the trial court must "serve as a gatekeeper, assessing both the witness' qualifications to testify in a particular area of expertise and the

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<sup>1</sup> *HNTB Georgia, Inc. v. Hamilton-King*, 287 Ga. 641, 697 S.E.2d 770 (Ga. 2010).

<sup>2</sup> *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993); see *Mason v. Home Depot USA*, 283 Ga. 271, 658 S.E. 2d 603 (2008) (applying the *Daubert* standard in Georgia, based on O.C.G.A. § 24-9-67.1, which is based on Federal Rule 702, which is based on the *Daubert* holding).

<sup>3</sup> *HNTB*, 287 Ga. at 642.

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relevancy and reliability of the proffered testimony.”<sup>4</sup> After examining the record, the Court found no abuse of discretion and stated that the trial court correctly applied the *Daubert* standard:

Reading the trial court's order as a whole, it is clear the court identified the legal issue relevant to Thomas' testimony, whether the design of the bridge project violated the applicable standard of care, and correctly examined Thomas' methodology in light of the *Daubert* standard. The court specifically noted Thomas' failure to cite any treatise or authority supporting his belief that under readily ascertainable and verifiable standards recognized by practitioners in the field, the construction design plan was below standard. It also noted the absence of any testing indicating evidence of similar accidents on interstate highways and the difficulty of ascertaining error rates in the use of engineering judgment. It did so not because it interpreted Georgia law to require evidence of testing or error rates in every case, but in an attempt to identify some foundation for Thomas' conclusion that bridge construction design plans lacking shoulders and/or lighting are inherently defective. The trial court thus chose among reasonable means of evaluating reliability, adjusted and applied the *Daubert* factors to the circumstances of this case, and ultimately decided that Thomas' conclusions, based solely on his own assertions, were unsupported by either the *Daubert* factors or any other reasonable reliability criteria.<sup>5</sup>

The Georgia Supreme Court, overturning the Court of Appeals, upheld the trial court's application of the *Daubert* standard. The Court rejected the Hamiltons' argument that an expert's experience provides a sufficient foundation for testimony, commenting that the “appellees have presented no evidence that [the expert] has any experience that would supply the foundation supporting his methodology and conclusions.”<sup>6</sup>

The Court did note that professional experience can provide evidence of reliability, but that “this experience, standing alone, does not render reliable all opinions an expert may express.”<sup>7</sup> The Court identified a distinction between cases in which an expert was prohibited from relying solely on experience and those in which experience was sufficient. In cases where expert testimony based solely on the expert's personal knowledge was deemed sufficient, “there was some evidence that the expert had experience with the particular procedure or practice at issue or the proffering party offered evidence explaining the absence of reliability criteria.”<sup>8</sup>

The Georgia Supreme Court's application of O.C.G.A. § 24-9-67.1 will impact methods litigants utilize in retaining potential experts and will provide a framework for litigants seeking to undermine the qualifications of an opposing expert. Therefore, going forward, litigants must be aware of the implications of the *Daubert* standard and anticipate its application by Georgia courts.

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<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 643-44 (internal citations omitted).

<sup>6</sup> *Id.* at 644-45.

<sup>7</sup> *Id.* at 645.

<sup>8</sup> *Id.*



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