

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION**

**PACIFIC COAST MARINE  
WINDSHIELDS LIMITED, a foreign  
corporation,**

**Plaintiff,**

**-vs-**

**Case No. 6:12-cv-33-Orl-28DAB**

**MALIBU BOATS, LLC, a California  
limited liability company, MARINE  
HARDWARE, INC., TRESSMARK, INC.,  
MH WINDOWS, LLC, JOHN F. PUGH,  
OWNER, PRESIDENT & CEO DARREN  
BACH**

**Defendants.**

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**ORDER**

This cause came on for consideration without oral argument on the following motions filed herein:

**MOTION: MOTION TO EXCLUDE TESTIMONY OF  
DEFENDANTS' EXPERT WITNESSES (Doc. No. 223)**

**FILED: August 3, 2012**

**THEREON it is ORDERED that the motion is GRANTED in part and  
DENIED in part.**

**MOTION: MOTION TO EXCLUDE EXPERT OPINIONS (Doc. No.  
246)**

**FILED: August 15, 2012**

**THEREON it is ORDERED that the motion is GRANTED in part and  
DENIED in part.**

In this dispute over marine windshield design and technology, Plaintiff Pacific Coast Marine Windshields Limited (“PCMW”) seeks to exclude from trial the opinions of two of the identified experts for Defendant Malibu Boats LLC (“Malibu Boats”)<sup>1</sup> citing the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993). Malibu, in turn, has filed its own motion seeking to exclude PCMW’s three experts.

To the extent the parties seek to exclude the testimony of experts Lorraine Barrick and Philip Green, who opine on damages using opposing damages models, the Court will **DEFER** any such ruling on the applicable damages methodology to the presiding District Judge consistent with his ruling on the parties cross-motions for summary judgment on this precise issue. *See* Docs. 176, 211.

Accordingly, this Court’s *Daubert* analysis and rulings are limited to the parties’ arguments as to the expert testimony of Robert Anders, Fred Smith, and Jeffrey Seyler. Because the Court finds that Robert Anders’ expert testimony is based on the correct formulation of the test for infringement and validity, and otherwise reliable, it will not be excluded. Because the Court finds that Fred Smith’s expert testimony is in large part based on the wrong standard for infringement and validity, or otherwise unreliable, the Court finds that most of it should be excluded. As to Jeffrey Seyler’s opinions, the Court finds (with the exception of certain matters deferred to the District Judge) that they are not subject to exclusion.<sup>2</sup>

## I. Background

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<sup>1</sup>The Court will refer to Defendants Malibu Boats LLC and Tressmark, Inc. collectively as Malibu Boats.

<sup>2</sup>Necessarily, the rulings herein are limited to the record presented on the motions. Should the issues and evidence develop differently at trial, reconsideration may be necessary. As well, for the allowed opinions to be considered properly by the jury, tailored and specific instructions (based on Federal Circuit case law) may be useful for these and other expert opinions in the case. The parties may even wish to propose such instructions for use in conjunction with the testimony of certain witnesses and not just at the conclusion of the trial.

PCMW filed suit against Defendants alleging infringement of three patents, two utility patents and a design-patent, claiming sole ownership of a corner post marine windshield design.<sup>3</sup> PCMW also asserts claims for copyright infringement, trade secret misappropriation, tortious interference, trade libel, and deceptive and unfair trade practices. PCMW contends that during 2005, Darren Bach, the president and founder of PCMW, conceived of a novel assembly and ornamental design for marine windshields. Mr. Bach is listed as the only inventor of all three patents, which he subsequently exclusively licensed to PCMW. PCMW alleges Defendants have infringed these Patents with their manufacture, importation, application, and sale of similar windshields made in China.

In its counterclaims, Malibu alleges that its employee, Dan Gasper – and not Mr. Bach – conceived of the windshield design covered by the ‘070 and ‘510 Patents in October 2005. Defendants contend that the Patents are invalid because they omit as a co-inventor Dan Gasper, a Malibu boat designer<sup>4</sup>.

PCMW seeks to exclude Defendants’ expert Fred Smith, who intends to offer a number of opinions in his reports concerning infringement and invalidity of PCMW’s ‘070 Patent. Malibu seeks to exclude the testimony of two of PCMW’s experts, Robert Anders and Jeffrey Seyler, who intend to testify as to the infringement of PCMW’s patents.

## II. Standards of Law

Federal Evidence Rule 702 governs the admission of expert testimony in federal court, and provides:

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<sup>3</sup>The windshield at issue is covered by two utility patents and a design patent. Doc. No. 69 at 34-38. The design patent for the marine windshield design is identified by United States Patent Number D555,070 (the “‘070 patent”). The utility patents are identified with United States Patent Numbers 7,418,917 (“the ‘917 Patent”) and 7,441,510 (“the ‘510 Patent”).

<sup>4</sup>Malibu has asserted counterclaims for infringement of U.S. Patent No. 6,647,915 (“the ‘915 patent”) (also relating to marine windshield technology), conversion, unfair competition, breach of contract, and for declaratory judgment of non-infringement and invalidity with respect to PCMW’s patent infringement claims.

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto 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.

Fed. R. Evid. 702. Rule 702 compels courts to perform a “gatekeeping” function—specifically, to determine whether the proffered expert testimony is reliable and relevant. *Oliver v. City of Orlando*, Case No. 6:06-cv-1671-Orl-28DAB, 2011 WL 2174010, \*2 (M.D. Fla. May 31, 2011) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 n. 7, 590–91, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)), *aff’d*, 456 Fed. Appx. 815 (11th Cir. Jan. 31, 2012); *Securities and Exchange Comm. v. Big Apple Consulting USA, Inc.*, 2011 WL 3753581, \*2 (M.D. Fla. Aug. 25, 2011). The Eleventh Circuit has highlighted the importance of *Daubert*'s gatekeeping function; it is because expert witnesses are free to opine without firsthand knowledge, while relying upon inadmissible hearsay, that courts must carefully judge the intellectual rigor employed by the expert. *Oliver*, 2011 WL 2174010, at \*2 (citing *United States v. Frazier*, 387 F.3d 1244, 1260 (11th Cir. 2004)); *Finestone v. Florida Power and Light Co.*, 272 Fed.Appx. 761, 767 (11th Cir. 2008) (internal citation omitted).

The Eleventh Circuit requires “a rigorous three-part inquiry.” *Frazier*, 387 F.3d at 1260. In order for expert testimony to be admissible, a district court must determine that (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert*; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *Id.* (quoting *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998)). The burden of laying the proper foundation for the admission of expert testimony rests with the party offering the expert. *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010) (“The burden of

laying the proper foundation for the admission of expert testimony is on the party offering the expert, and the admissibility must be shown by a preponderance of the evidence.”); *McCorvey v. Baxter Healthcare Corp.*, 298 F.3d 1253, 1256 (11th Cir. 2002).

### **III. General Contentions as to Witnesses**

#### **A. Robert Anders**

Malibu argues that the opinion of PCMW’s expert Robert Anders that Malibu has infringed the ‘070 Patent should be excluded. They argue Mr. Anders’ opinion should be excluded because he is not qualified to opine on how the ordinary observer views marine windshields; he applied the wrong legal standards; his method is unreliable; and his opinion would not assist the trier of fact. Malibu argues his opinion on copyright infringement should also be excluded.

#### **B. Fred Smith**

PCMW seeks to exclude the testimony of Malibu’s expert Fred Smith, who intends to offer a number of opinions concerning infringement and invalidity of PCMW’s ‘070 Patent. PCMW argues that Mr. Smith’s testimony should be excluded because he lacks the training and relevant experience to qualify him as an expert in design patents, ornamental design, or industrial design; he applied the wrong legal standard in forming his opinions; he employed the wrong legal tests and incorrectly analyzed anticipation and obviousness; he admittedly did not know the legal standard used by the examiner; and he offered opinions concerning copyright infringement despite a lack of relevant experience and understanding of the legal standard for infringement. Additionally, PCMW objects to Mr. Smith’s opinions because he intends to offer testimony concerning matters that were not addressed in his reports. PCMW asserts that Mr. Smith is not qualified to testify regarding design patents, the marine industry and copyright infringement because he has no relevant expertise. Doc. 223.

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