

367 Fed.Appx. 234

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United States Court of Appeals, Second Circuit.

The BOARD OF TRUSTEES OF the FREEHOLDERS AND COMMONALITY OF the TOWN OF SOUTHAMPTON, The Town Board of the Town of Southampton, Cynthia Hamlin Ireland, Plaintiffs–Appellants,

v.

SUFFOLK COUNTY OF NEW

YORK, Defendant–Appellee,

United States of America, Third–

Party–Defendant–Appellee,

John and Jane Does 1–10, Defendants–Appellees,

The State of New York, George E. Pataki,

Environmental Conservation of the State of New York, John P. Cahill, Alexander F. Treadwell, Fred Naffer, William Daly, Third–Party–Defendants.

Nos. 08–4759–cv(L), 08–4993–
cv(XAP), 08–6130–cv(CON)

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Feb. 25, 2010.

Synopsis

Background: Appeal was taken from order of the United States District Court for the Eastern District of New York, [Cogan, J.](#), dismissing plaintiffs' claims for nuisance, negligence, and violations of the Endangered Species Act.

Holdings: The Court of Appeals held that:

[1] expert's testimony was supported by data and detailed reasoning;

[2] expert's testimony was consistent with his written report; and

[3] district court did not clearly err in crediting testimony of defendants' expert over that of plaintiffs' expert.

Affirmed.

West Headnotes (3)

[1] **Evidence** 🔑 Nature, condition, and relation of objects

Expert's testimony concerning littoral drift in front of plaintiffs' oceanfront property was supported by data and detailed reasoning in action alleging nuisance, negligence and violations of the Endangered Species Act, and thus district court did not abuse its discretion in overruling plaintiffs' *Daubert* objections. Endangered Species Act of 1973, § 2 et seq., [16 U.S.C.A. § 1531 et seq.](#)

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[2] **Federal Civil Procedure** 🔑 Failure to respond; sanctions

Expert's trial testimony regarding eastward movement of net littoral transport in front of plaintiff's oceanfront property was consistent with his written report, and thus expert's testimony was not required to be excluded for violating advanced disclosure requirement in action alleging nuisance, negligence, and violations of the Endangered Species Act, where expert's report concluded that the net littoral transport system was a “constantly varying movement of sand, involving both longshore motion to the east and to the west.” [Fed.Rules Civ.Proc.Rule 26\(a\)\(2\)\(B\)](#), [28 U.S.C.A.](#); Endangered Species Act of 1973, § 2 et seq., [16 U.S.C.A. § 1531 et seq.](#)

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[3] Evidence 🔑 **Conflicts between experts**

District court, that was presented with conflicting expert testimony, supported by facts and reasoning on both sides, did not clearly err in crediting testimony of defendants' expert over that of plaintiffs' expert as to wave information studies data, numerical modeling, and so-called Leatherman data in action alleging violations of the Endangered Species Act. Endangered Species Act of 1973, § 2 et seq., 16 U.S.C.A. § 1531 et seq.

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***235** Appeal from a judgment of the United States District Court for the Eastern District of New York (Cogan, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be **AFFIRMED**.

Attorneys and Law Firms

Jeffrey M. Pollock, Fox Rothschild LLP, New York, NY; Gary Ireland (on the brief), Law Offices of Gary Ireland, New York, NY, for Cynthia Ireland.

Richard C. Cahn, Cahn & Cahn, LLP, Melville, NY, for The Board of Trustees of the Freeholders and Commonalty, the Town Board of the Town of Southampton.

Daniel A. Bartoldus (William J. Lewis, Marcy D. Sheinwold, Christina L. Geraci, on the brief), Lewis Johs Avallone Aviles, LLP, Melville, NY, for Appellees.

PRESENT: DENNIS JACOBS, Chief Judge, ROSEMARY S. POOLER, ROBERT A. KATZMANN, Circuit Judges.

SUMMARY ORDER

Plaintiffs–Appellants Cynthia Ireland, the Board of Trustees of the Freeholders and Commonalty of the Town of Southampton, and the Town Board of the Town of Southampton (the latter two collectively, “the Town”), appeal the judgment dismissing their claims for nuisance,

negligence, and Endangered Species Act violations. We assume the parties' familiarity with the underlying facts, the procedural history, and the issues presented for review.

[1] Ireland argues that the district court erred in overruling her objections made pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). The only *Daubert* objections raised at trial were narrowly aimed at Dr. David Aubrey's testimony concerning littoral drift at Montauk Point; the (far more broad) *Daubert* arguments that Ireland first raises on appeal are therefore forfeited. See *In re Nortel Networks Corp. Sec. Litig.*, 539 F.3d 129, 132 (2d Cir.2008); see also *Jacquin v. Stenzil*, 886 F.2d 506, 508 (2d Cir.1989).

Daubert contemplates “liberal admissibility standards.” *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir.2002). “We review the district court's decision to admit or exclude expert testimony under a highly deferential abuse of discretion standard.” *Zuchowicz v. United States*, 140 F.3d 381, 386 (2d Cir.1998). We will reverse only if the district court's decision was “manifestly erroneous.” *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1042 (2d Cir.1995). Here, Aubrey's conclusions regarding Montauk Point were supported by data and detailed reasoning; accordingly, the district court did not abuse its discretion in overruling the objections.

[2] Ireland also contends that the County violated *Federal Rule of Civil Procedure 26(a)(2)(B)* because it failed to make advanced disclosure that Aubrey would testify at trial that net littoral transport in front of the Ireland home was, at times, to the east. Aubrey's written report, however, clearly concluded that the ***236** littoral transport system is actually a “constantly varying movement of sand, involving both longshore motion to the east and to the west.” His testimony at trial was fully consistent with this position. The district court did not abuse its discretion in permitting Aubrey to testify at trial. See *Sofitel, Inc. v. Dragon Med. & Scientific Commc'ns Inc.*, 118 F.3d 955, 961 (2d Cir.1997).

[3] Both plaintiffs argue that the district court erred in crediting Aubrey's testimony over that of their own expert, Dr. Robert Dean. This argument challenges the district court's credibility determinations and factual conclusions, both of which we review for clear error. See *Palazzo ex rel. Delmage v. Corio*, 232 F.3d 38, 42 (2d Cir.2000); see also *Amalfitano v. Rosenberg*, 533 F.3d 117, 123 (2d Cir.2008). Under clear error review, we may not “second-guess either the trial court's

credibility assessments or its choice between permissible competing inferences,” *Ceraso v. Motiva Enters., LLC*, 326 F.3d 303, 316 (2d Cir.2003), nor may we “reverse ‘simply because [we are] convinced that [we] would have decided the case differently,’ ” *Nat’l Mkt. Share, Inc. v. Sterling Nat’l Bank*, 392 F.3d 520, 528 (2d Cir.2004) (quoting *Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 573, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)).

Plaintiffs specifically contend that the district court erred in its conclusions regarding Wave Information Studies data, numerical modeling, and so-called Leatherman data. But as to each of these considerations, the district court was presented with conflicting expert testimony, supported by facts and reasoning on both sides. “Where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Anderson*, 470 U.S. at 574, 105 S.Ct. 1504.

[4] The Town argues that the district court committed clear error in concluding that plaintiffs had failed to sustain their burden of proving causation. Specifically, the Town contends, *inter alia*, that the district court failed to account for certain important evidence, credited Aubrey’s testimony even though it suffered from multiple purported inconsistencies, and failed to recognize that Aubrey’s conclusions were at odds with other experts who have studied the region. The Town’s arguments, however, rely on misstatements of the record, are

unsupported by the evidence presented at trial, and otherwise put far more weight on particular evidence than that evidence can reasonably bear. We find no error here. See *Contship Containerlines, Ltd. v. PPG Indus., Inc.*, 442 F.3d 74, 79 (2d Cir.2006) (reviewing a district court’s causation finding under the clear error standard).

[5] The Town also argues that the district court erred by considering the wrong time frames in its analysis. Aubrey and Dean presented conflicting testimony as to the proper historical comparisons to make, and both experts supported their conclusions with data and developed reasoning. The district court did not clearly err in crediting Aubrey’s testimony over Dean’s. See *Blondin v. Dubois*, 238 F.3d 153, 158, 163 (2d Cir.2001).

[6] Because we find no basis to disturb the district court’s core holding as to causation, we do not consider the Town’s arguments as to unclean hands, nuisance, or the Endangered Species Act.

Finding no merit in plaintiffs’ remaining arguments, we hereby **AFFIRM** the judgment of the district court.

All Citations

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