

**DAUBERT HEARING**  
**(Circuit Court Kent County, Michigan, Case No. 05-10235-CZ)**  
**Honorable Donald A. Johnston**  
**December 6, 2007**

S T A T E O F M I C H I G A N

THE 17TH CIRCUIT COURT FOR THE COUNTY OF KENT

**NEW EQUIPMENT LEASING, a Michigan  
corporation,**

Plaintiff,

vs

Case No. **05-10235-CZ**

**JUNGLE GYM'S, INC., an Indiana  
corporation; RICHARD HATFIELD, an  
individual; LEE HATFIELD, an individual;  
MARK DORNT, an individual; PAIGE DORNT,  
an individual; and MULLIGAN'S RESTAURANT  
& BAR, an Indiana corporation,**

Defendants.

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**JURY TRIAL - DAY 1**  
**(Excerpt - testimony of Robert D. Kullman)**

BEFORE HONORABLE DONALD A. JOHNSTON, CIRCUIT JUDGE  
Grand Rapids, Michigan - **Thursday, December 6, 2007**

APPEARANCES:

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1 THE COURT: Thank you. I'm not sure that we've  
2 ever been called upon specifically to examine the process of  
3 document examination, particularly handwriting analysis,  
4 under the **Daubert** test, but it is true that, over the years,  
5 this Court has heard expert testimony pertaining to  
6 handwriting analysis and, particularly examination of  
7 signatures.

8 I can't remember whether Mr. Kullman himself has  
9 appeared here, but I've heard other experts over the years,  
10 and I'm at least, in general, familiar with Mr. Kullman.

11 I also am familiar with some of the individuals  
12 under whom he studied with the state police, my tenure going  
13 back a long ways. I've been on the bench 28, almost 29,  
14 years, and I was 10 years in the prosecutor's office before  
15 that, during which time we made regular use of handwriting  
16 analysis.

17 So, it's been used in court on a regular basis.  
18 Much of my experience in that connection was pre-**Daubert**,  
19 although I think we've had post-**Daubert** testimony that  
20 simply has not been challenged previously. So, as far as  
21 I'm aware, this is the first time that I've been confronted  
22 with the challenge.

23 The rule, properly referenced by counsel, is MRE  
24 702, which states, quote:

25 "If the court determines that scientific,

1 technical, or other specialized knowledge will  
2 assist the trier of fact to understand the  
3 evidence or to determine a fact in issue, a  
4 witness qualified as an expert by knowledge,  
5 skill, experience, training, or education may  
6 testify thereto in the form of an opinion or  
7 otherwise if (1) the testimony is based on  
8 sufficient facts or data, (2) the testimony is the  
9 product of reliable principles and methods, and  
10 (3) the witness has applied the principles and  
11 methods reliably to the facts of the case."

12 Unquote.

13 Most of what we've talked about here today is number (2), I  
14 suppose, whether the testimony is the product of reliable  
15 principles and methods.

16 The **Daubert** case gives us a little further  
17 expansion, and I think both parties have quoted the so-  
18 called five prongs that we find there. I see it in  
19 defendant's brief on page 5.

20 As to those five factors, number one is:

21 "Whether the expert's theory or technique can  
22 be and has been tested."

23 The answer is "yes." Apparently it gets tested on a fairly  
24 regular basis, and the nice thing about it is that it's  
25 possible to put together a test where the conclusions are

1 known by the tester but not by the person being tested, and  
2 the methods can thereby be applied and the result achieved  
3 by applying them, determined as against the known  
4 conclusion.

5           Apparently this sort of testing goes on all the  
6 time. There is some literature about it in scientific  
7 journals, and more importantly, Mr. Kullman himself and his  
8 colleagues are subject to this kind of testing on apparently  
9 a fairly regular basis, one test having been administered in  
10 the not too distant past.

11           Secondly:

12           "Whether the expert's theory or technique has  
13 been subjected to peer review."

14 I guess the answer to that is "yes." Among other things, we  
15 have the ASTM standards which have developed, I gather, over  
16 a period of time, and the *Standard Guide* and its nine point  
17 scale has been examined over a period of a time, has been  
18 regularly applied, and apparently with reliable and  
19 consistent results.

20           The so-called Kamm study, published by the  
21 *American Academy of Forensic Sciences*, seems to confirm  
22 this, according to the testimony of the witness, and while  
23 I'm not familiar with the study, I have no reason to doubt  
24 the testimony in that regard.

25           The "known or potential rate of error" I suppose

1 can be discerned through the same testing modality over a  
2 period of time, and certainly with respect to individuals.  
3 In the case of Mr. Kullman, apparently he has always been  
4 determined to be proficient in the appropriate fields.

5 Four is:

6 "The existence and maintenance of standards  
7 controlling techniques, operations,"  
8 and there again, the ASTM standards would seem to indicate,  
9 yes, there are standards with respect to the techniques and  
10 operations.

11 And five:

12 "General acceptance in the scientific  
13 community."

14 Again, apparently the American Academy of Forensic Sciences  
15 recognizes this study and its validity, and it, therefore,  
16 is accepted generally in the forensic science community,  
17 which is the scientific community to which it properly  
18 belongs.

19 Certainly there is a measure of subjectivity here,  
20 although I find that to be true in most forms of scientific  
21 endeavor. Certainly, with regard to fingerprints, it's  
22 true. Different examiners will look for different things,  
23 and Mr. Kullman's correct. The so-called "point system"  
24 seems to have fallen into disfavor over the last several  
25 years, and as far as I know, is not longer utilized, but I

1 think different examiners will put different amounts of  
2 emphasis on different features when doing a comparison. And  
3 yet, the general methodology is well understood, well  
4 respected, and well accepted.

5 Even in terms of laboratory and chemical analysis,  
6 sometimes the subjective assessment of the lab technician  
7 concerning the color of a compound, or its depth or  
8 thickness, is a factor. Its smell even comes into play, and  
9 there can be some variation. But when taken with all the  
10 other factors that are at use, it is generally seen to be  
11 scientific and acceptable.

12 So, it seems to me that, while we are not yet  
13 sure, because we haven't gotten to the merits of the  
14 testimony, whether Mr. Kullman had, for instance, sufficient  
15 facts or data. Apparently, for instance, on his known  
16 samples, he had photocopies rather than originals, and  
17 whether that was sufficient for him to make a determination  
18 we still haven't heard, and we may have to discuss that as  
19 we go on. And likewise, we haven't heard specifically that  
20 the witness applied the principles and methods reliably to  
21 the facts of the case because we haven't gotten into his  
22 specific analysis.

23 But as to the real nub of the question, it seems  
24 to me that the testimony he will offer is the product of  
25 reliable principles and methods, and that the **Daubert** test

1 has been met sufficiently to allow the witness to give  
2 testimony, in opinion form or otherwise, from which, of  
3 course, together with other evidence in the case, the Court,  
4 as finder of fact, will ultimately have to arrive at some  
5 sort of a conclusion here.

6 (At 12:06 p.m., witness accepted as an expert)

7 All right. We, I think, can proceed. I should  
8 note to counsel that I've just gotten a message. One of the  
9 problems with having computers in the courtroom is that  
10 judges are always getting messages, among other things, and  
11 I've been summoned to a meeting with the chief judge at  
12 12:30, for which they are not even going to feed us  
13 apparently, but nevertheless, I need to recess and attend in  
14 about a half an hour. So, we'll probably have break at that  
15 point.

16 Mr. O'Brien, you have the floor.

17 MR. O'BRIEN: Thank you, Your Honor.

18 **DIRECT EXAMINATION**

19 **BY MR. O'BRIEN:**

20 Q. Okay, Mr. Kullman. What were you asked to do specifically  
21 with a request--Wait.

22 MR. O'BRIEN: Before I do that, Your Honor, I'll  
23 move for the admission of Exhibit number 7.

24 THE COURT: What is number 7?

25 MR. O'BRIEN: The CV.