Spoiling Spoliation

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An Update of Daubert and Frye Rulings

Introduction

With recent amendments to Federal Rule of Civil Procedure 26 and a proliferation of Motions to Strike/Exclude Expert Testimony under the Court's responsibility as a gatekeeper of information that is to be considered by a jury, keeping apprised of recent rulings on these issues is key to effectively using experts in defending mass tort claims. This article reviews recent *Daubert* and *Frye* decisions that may assist in having an opponent's experts testimony stricken before presentation to a jury.

Daubert/Frye Update

The United States Court of Appeals for the District of Columbia established the *Frye* test in 1923 by articulating the following:

> Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
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> *Frye v. United States*, 293 F. 1013, 1014 (D.D.C. 1923).

Seven decades after *Frye*, the United States Supreme Court in *Daubert* rejected the general acceptance test because FRE 702 does not expressly require general acceptance, and the requirement is inconsistent with the federal rules' relaxation of the traditional barriers to "opinion testimony." *Anderson v. Akzo Nobel Coatings, Inc.*, 260 P.3d 857, 861 (Wash. 2011) (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 588, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993)). Applying the *Daubert* test, courts "must determine if the reasoning or methodology underlying the testimony is scientifically valid and can be applied to the facts at hand." *Id.*

The *Frye* test and the *Daubert* test have been respectively referred to as the "general acceptance" and the "reliability" tests. *Id.* (citing David E. Bernstein, *Frye, Frye, Again: the Past, Present, and Future of the General Acceptance Test*, 41 Jurimetrics J. 385, 388-89 & n.31 (2001)). In addition to these tests, most jurisdictions apply their own statutory versions of FRE 702 to expert testimony, which may or may not incorporate aspects of either test. *See, e.g.*, *id.* at 859 ("Generally, the admissibility of expert testimony in Washington is governed by ER 702."); *Edry v. Adelman*, 786 N.W.2d 567, 570 (Mich. 2010) (stating that "admissibility of expert witness testimony is governed by MRE 702. . . . This Court has stated that MRE 702 incorporates the standards of reliability that the United States Supreme Court described to interpret the equivalent federal rule of evidence in *Daubert*. . . ."). In *Anderson*, the Washington Supreme Court reasoned that "[s]ince the real challenge was whether the proffered testimony had a proper foundation," the issue should be resolved under state evidence rules 702 and 703. *Id.* (citations omitted). Applying the state evidence rules instead of *Frye*, the *Anderson* Court described the *Frye* test as "an additional tool used by judges" and explained that once *Frye* is satisfied, the evidence must still meet other "significant standards of admissibility." *Id.* at 864.

a. Frye Decisions

A minority of states maintain strict adherence to the *Frye* test, and the trend toward *Daubert* in recent decisions appears even stronger in the civil context. *See, e.g., id.* at 861 (stating that "[d]espite the national trend toward *Daubert*, we declared our continued adherence to the more stringent *Frye* test [at least in criminal cases]. In civil cases, we have neither expressly adopted *Frye* nor expressly rejected *Daubert*.") (internal citations omitted). The *Anderson* Court, however, "assume[d] without deciding" that *Frye* was the appropriate test for civil cases because the parties and lower courts had assumed *Frye* was applicable. *Id.* at 862; *see also Chestang v. IPSCO Steel (Alabama), Inc.*, 50 So.2d 418, 438 (Ala. 2010) (refusing to issue an "advisory opinion" addressing IPSCO Steel's request that the Court overrule its prior decision adopting *Frye* by now adopting the *Daubert* test).

(1) "Generally Accepted in the Scientific Community"

The *Anderson* Court recently summarized Washington State's *Frye* jurisprudence:

> The primary goal is to determine "whether the evidence offered is based on established scientific methodology." Both the scientific theory underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under *Frye*. "If this is a *significant* dispute among *qualified* scientists in the relevant scientific community, the evidence may not be admitted," but scientific opinion need not be unanimous.
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> *Id.* at 862 (quoted citations omitted) (emphasis in original).

Along these lines, the Supreme Court of Maryland recently considered the application of the state's *Frye-Reed* test (referring to the Maryland decision adopting *Frye*) to an expert's analysis "where the underlying data and methods for gathering this data are generally accepted in the scientific community but [were] applied to support a novel theory." *Blackwell v. Wyeth*, 971 A.2d 235, 248 (Md. 2009). For guidance, the Maryland Court turned to opinions of federal courts that "have had occasion to scrutinize the *reliability* of the analytical framework utilized by an expert in formulating a novel theory of science . . ., recognizing that they utilized the *Daubert* standard rather than *Frye*." *Id.* at 253. After reviewing federal decisions, the Court acknowledged that "[t]he 'analytical gap' concept also has been employed by some of our sister states in a *Frye* analysis." *Id.* at 254 (referring to *Goeb v. Tharaldson*, 615 N.W.2d 800, 816 (Minn. 2000) and *Kane v. Motorola, Inc.*, 335 Ill. App. 3d 214, 221-22 (2002)).

Ultimately, the *Blackwell* Court concluded that "[g]enerally accepted methodology . . . must be coupled with generally accepted analysis in order to avoid the pitfalls of an 'analytical gap.'" *Id.* at 255. The Court called the expert's conclusion "ethereal because the bases of the expert's opinion, including the theory of causation, and the methodologies, are *not* 'generally accepted as reliable within the expert's particular scientific field," and "the data he relies upon was not tested nor gathered for the purpose of testing the hypothesis that thimerosal in vaccines causes autism." *Id*. Finally, the Court emphasized that none of the expert's research "aimed at establishing a link between thimerosal and autism . . . is based upon a sound methodology." *Id.*

Specifically, the *Blackwell* case involved the admissibility of the expert's differential diagnosis test to prove general causation in a products liability action against a manufacturer of vaccines containing thimerosal. *Id.* at 259. Relying exclusively on the federal court's opinion in *Doe v. Ortho-Clinical Diagnostics, Inc.*, 440 F. Supp. 2d 465 (M.D.N.C. 2006), the Maryland Supreme Court found the following:

> It is well settled that "[g]enerally, it is not appropriate to rely on a differential diagnosis to prove general causation" [quoting *Ortho-Clinical*, at 477]. Indeed, "[a] differential diagnosis that fails to take serious account of other potential causes may be so lacking that it cannot provide a reliable basis for an opinion" [quoting *Ortho-Clinical*, at 471]. It is noteworthy that other courts have acknowledged that [this expert's] methodology of differential diagnosis is fundamentally flawed, because he improperly "rules in" thimerosal as a potential cause of autism, and he cannot rule out the high likelihood that autism in any given individual was caused purely by genetic factors that do not require an environmental trigger [citing *Ortho-Clinical*, at 465].
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> *Blackwell*, 971 A.2d at 259-60.

In the criminal context, the Illinois Supreme Court in *People v. McKown* considered whether a horizontal gaze nystagmus (HGN) test was generally accepted in the relevant scientific community as an indicator of alcohol impairment related to an aggravated DUI charge. 924 N.E.2d 941, 944 (Ill. 2010). Responding to testimony that HGN testing is generally accepted within the law enforcement community as a field-sobriety test, the Court held that law enforcement is "not a scientific field. Therefore, general acceptance within law enforcement circles cannot be the basis for finding scientific evidence admissible under *Frye*." *Id.* at 953. Rather, "the relevant scientific fields that embrace the testing for and observation of HGN include medicine, ophthalmology, and optometry." *Id.* "Thus, the question of general acceptance must be determined from the testimony of experts and the literature in these scientific fields, and not from the testimony or writings of law enforcement officers or agencies." *Id.* Despite its holding, however, the Court noted that it "has never been a requirement under *Frye*" that the expert "be a member of the scientific field to which the evidence belongs." *Id.* at 953-54 n.3. In fact, "a police officer trained as an accident-reconstruction expert may be qualified to testify regarding the use of certain principles of physics to determine how fast a vehicle was traveling at the moment of impact, even though the expert is not a physicist." *Id.*

Upon deciding the relevant scientific community, the *McKown* Court next turned to the "general acceptance" requirement. *Id.* at 954. The Court decided that "before we can determine whether a scientific principle is generally accepted, we must define the purpose for which it is being used at trial." *Id.* On remand, the trial court had concluded that both ophthalmology and optometry generally accept the principle that the HGN test may be an indicator of alcohol consumption. *Id.* The trial court had further stated "that the use of HGN test results at trial 'should be limited to the conclusion that a 'failed' test suggests that the subject may have consumed alcohol and may [have] be[en] under the influence.'" *Id.* (alterations in original). But "[t]here should be no attempt to correlate the test results with any particular blood-alcohol level or level of intoxication." *Id.* The Illinois Supreme Court agreed and found that "[c]onsumption of alcohol is a necessary precondition to impairment due to alcohol. Therefore, any evidence of alcohol consumption is relevant to the question of impairment." *Id.* (citation omitted). Accordingly, the Court adopted the trial court's finding that HGN testing is generally accepted in the relevant scientific fields and that evidence of HGN test results is admissible *for the purpose of* proving that a defendant *may* have consumed alcohol and *may*, as a result, be impaired." *Id.* at 955 (emphasis added).

(2) Novel Scientific Evidence

In *Anderson,* the Washington Supreme Court held that the *Frye* test is not implicated "if the theory and the methodology relied upon and used by the expert to reach an opinion on causation is generally accepted by the relevant scientific community." *Anderson*, 260 P.3d at 859. In an action for negligence and wrongful discharge, the defendant had successfully moved *in limine* to strike most of plaintiff's experts for failing to meet the *Frye* standard, and consequently was awarded summary judgment on the negligence claim, which depended on the proposed testimony. *Id.* at 860. The *Anderson* Court reversed, however, and held the *Frye* test "is only implicated where the opinion offered is based upon novel science." *Id.* at 866; *see also McKown*, 924 N.E.2d at 944 (finding "the *Frye* test is necessary only if the scientific principle, technique or test offered by the expert to support his or her conclusion is 'new' or 'novel') (citation omitted)). Specifically, the *Frye* test applies "where either the theory and technique or method of arriving at the data relied upon is so novel that it is not generally accepted by the relevant scientific community." *Id.*

In reaching its decision, the *Anderson* Court first acknowledged that "the relevant scientific community has yet to seriously research whether exposure to the specific type of organic solvents present in Akzo's auto paint can cause the specific type of birth defects at issue." *Id.* at 863. Disagreeing with the trial court's finding that "under Washington common law there must be a general consensus of scientific causation," the Washington Supreme Court explained that it had "never considered whether, as a threshold matter, there must be scientific consensus that a specific type of exposure causes a specific type of injury before expert testimony is admissible under *Frye*." *Id.*

In clarification, the *Anderson* Court stated: "*Frye* envisioned an evolutionary process with novel techniques passing through an 'experimental' stage during which they would be scrutinized by the scientific community until they arrived at a 'demonstrable' stage." *Id.* at 864 (citing *Frye*). Significantly, the Court found the "difference in degree of confidence to satisfy the *Frye* 'general acceptance' standard and the substantially lower standard of 'preponderance'

required for admissibility in civil matters has been referred to as 'comparing apples to oranges.'" *Id.* at 865 (quoted citation omitted). "To require the exacting level of scientific certainty to support opinions on causation would, in effect, change the standard for opinion testimony in civil cases." *Id.* (citing *Reese v. Stroh*, 128 Wash.2d 300, 310 & 312 (1995) (C. Johnson, concurring)). For emphasis, the Court explained that if it were to "require 'general acceptance' of each discrete and evermore specific part of an expert opinion, virtually all opinions based on scientific data could be argued to be within some part of the scientific twilight zone." *Id.* at 866.

(3) Permissive Application of Frye

Recent *Frye* decisions in some jurisdictions suggest a very low threshold for admissibility. In *Summers v. Certainteed Corp.*, the Pennsylvania Supreme Court considered an expert's causation testimony supporting plaintiffs' strict liability claims involving asbestos. 997 A.2d 1152, 1155 (Pa. 2010). Here, the expert concluded "to a reasonable degree of medical certainty" that "[e]ach and every exposure to asbestos has been a substantial contributing factor to the abnormalities noted." *Id.* at 1161. The Court rejected the appellate court's conclusion that the expert's opinions were "factually and legally insufficient to establish the causes of Appellants' condition," and explained that "trial judges are required 'to pay deference to the conclusions of those who are in the best position to evaluate the merits of scientific theory and technique when ruling on the admissibility of scientific proof.'" *Id.* at 1160-61 (quoting *Grady v. Frito-Lays, Inc.*, 839 A.2d 1038, 1045 (Pa. 2003) (citing *Frye*)). At the summary judgment stage, the Court reasoned that the requirement to take all facts and reasonable inferences in a light most favorable to the non-moving party "clearly includes all expert testimony and reports submitted by the non-moving party or provided during discovery. . . ." *Id.* Therefore, "the trial judge must defer to those conclusions, [citing *Grady; Frye*], and should those conclusions be disputed, resolution must be left to the trier of fact." *Id.* (citing *Miller v. Brass Rail Tavern, Inc.*, 664 A.2d 525, 528 (Pa. 1995)).

Disagreeing with the majority's permissive application, the concurrence in *Summers* called for a stricter *Frye* analysis. *Id.* at 1167-68 (Saylor J., concurring). Initially, Justice Saylor guessed that the trial court may have believed inquiry into the admissibility of the expert's testimony under *Frye* was not implicated, on the theory that the methodology employed was not novel. *Id.* at 1167 (citation omitted). According to Saylor, however, Pennsylvania trial courts "should maintain a meaningful screening role in determining the admissibility of evidence adduced from those laying claim to special expertise." *Id.* Under Saylor's definition of the term "novel," the trial court should apply a *Frye* test to "any scientific method which cannot be fully explained in terms of generally accepted scientific theory upon a close evaluation." *Id.* at 1168. Recognizing that *Daubert* is "understood as the more liberal standard, its purpose remains to guard against consideration by jurors of unreliable evidence disguised as scientifically-based expert opinion." *Id.* (citations omitted). Justice Saylor was particularly opposed to the majority's "default to a let-the-jury-decide approach to the admissibility of scientific evidence," and he explained that "a physician's pronouncement that the cause of an injury was a particular condition should not be insulated from judicial scrutiny purely because it is the type of things physicians say." *Id.* Rather, "it is a fair inquiry for courts to meaningfully consider whether the physician's specific *methodology for arriving at the conclusion* is supported by generally accepted scientific principles, as a prerequisite to admitting the opinion into evidence." *Id.* (emphasis in original).

Likewise, the dissent in *Summers* took issue with the majority's decisions to allow a jury to hear the case based solely on the expert's testimony that "'each and every' exposure to asbestos was not just a factor, but a *substantial* contributing factor to that shortness of breath." *Id.* at 1171 (Eakin J., dissenting) (emphasis in original). In addition to believing that the expert's "every breath" theory was suspect, Judge Eakin described the expert's conclusion as "difficult" in light of each appellant having "so many other conditions." *Id.* (referring the appellants' histories of cigarette smoking and medical issues). Finding no error in rejecting the proffered opinion on its face, Judge Eakin stated the following: "[e]ach asbestos fiber, each cigarette, each cheeseburger is literally but a drop in the proverbial bucket—a bucket unquestionably full, but to call each drop substantial mocks the legal concept of the word. Common sense tells us the doctor simply overstated the matter." *Id.*

b. Daubert Decisions

(1) Reliability

In *Sherwin-Williams Co. v. Gaines*, Sherwin-Williams challenged the reliability of plaintiff's causation experts in a product-liability case where the jury had awarded

$7 million to the plaintiff based on its finding that he had been brain damaged from exposure to lead in paint. 75 So.3d 41, 42 (Miss. 2011). The Mississippi Supreme Court considered whether the trial court erred in determining the expert's opinion, that lead poisoning caused cognitive impairments, was reliably based on science and the facts presented. *Id.* at 43. Explaining the importance of reliable expert testimony, the Court stated: "Mississippi Rule of Evidence 702 and our familiar *Daubert* standard require trial courts to act as 'gatekeepers' with regard to expert opinion testimony, because juries tend to place great weight on the testimony of experts and can be misled by unreliable opinions." *Id.* at 45 (citations omitted).

Here, the *Sherwin-Williams* Court disagreed with the trial court and held that the experts' opinions were not reliable. *Id.* In support of its decision, the Court stated that "[a] dose-response ratio is critical to determining the causal connection between a poison and an injury," but in this case "the only known dose—or ingestion of lead—is represented by [plaintiff's] elevated blood lead levels from September 1993." *Id.* at 45-46. By "extrapolat[ing] both dose and duration with only circumstantial supporting evidence," the experts engaged in a "classic logical fallacy: *post hoc ergo propter hoc* ['After this, therefore, because of this']." *Id.* at 46. The Court emphasized that the bases for the experts' testimony—"that [the plaintiff] was ingesting and being poisoned by lead the entire time he lived in the house—was mere speculation and inadmissible." *Id.*; *see also McKee v. Bowers Window & Door Co., Inc.* 64 So.3d 926, 935-36 (Miss. 2011) (concluding that expert testimony regarding allegedly defective windows was nothing more than "unsupported speculation or subjective belief" where the expert reviewed no outside sources, could cite no industry standards except his own personal standard, and effectively utilized "no methodology, much less a scientifically recognized one").

The trial judge in *Sherwin-Williams* had failed to consider multiple arguments concerning the reliability of the plaintiff's experts, regarding them "as challenges to the weight and not the admissibility of the experts' testimony." *Id.* Addressing this issue, the Mississippi Supreme Court felt obligated to provide the following guidance: "[o]ur trial judges work exceedingly hard and have discretion in how they discharge their gatekeeping duty, but we take this opportunity to reiterate that such duty includes making sure that the opinions themselves are based on sufficient facts or data and are the product of reliable principles and methods." *Id.* (citations omitted).

Addressing the admissibility standard for medical causation testimony, the Supreme Court of Colorado, in *Estate of Ford v. Eicher*, found that the trial court had applied an incorrect legal standard in its reliability analysis when it determined "as a threshold matter that the plaintiff's causation expert did not hold his opinion to the required degree of reasonable medical probability." 250 P.3d 262, 265 (Colo. 2011). The *Eicher* Court held instead that "the trial court should have analyzed the admissibility of the experts' testimony under [Colorado Rule of Evidence] 702." *Id.* at 266. "Under CRE 702, concerns about the degree of certainty to which the expert holds his opinion are sufficiently addressed by vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof rather than exclusion." *Id.* (citing *People v. Shreck*, 22 P.3d 68, 77 (Colo. 2001) (citing *Daubert*, at 596)). The Court therefore held: "expert medical testimony need not be rendered with 'reasonable medical probability or certainty' to be admissible." *Id.* (citations omitted).

The *Eicher* Court also addressed whether the trial court erred in excluding another doctor's expert causation testimony on the fact that his theory was not testable and error rates could not be assessed. *Id.* at 268. With respect to testability and error rates of the doctor's theory that intrauterine forces caused the injury, the Court stated the following:

> First, excluding testimony because the theory cannot be tested and error rates cannot be assessed focuses the reliability analysis too narrowly. The nature of the intrauterine forces theory makes it impossible and unethical to test. It follows that error rates cannot be assessed. While the testability and error rates of a scientific theory are factors a trial court *may* consider in assessing reliability, the trial court may give these factors more or less weight or disregard them altogether if the case so requires. The CRE 702 inquiry is designed to be flexible to accommodate precisely this type of situation. A theory's inability to satisfy some of the suggested reliability factors will not automatically render the theory unreliable.
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> *Id.* at 268-69 (emphasis in original).

(2) Factual Foundation

In a personal injury case involving a three-car accident,

the Supreme Court of Delaware found that the trial judge had properly exercised his discretion in determining that certain expert testimony was inadmissible under *Daubert* and Delaware Rule of Evidence 702(1). *See Perry v. Berkley*, 996 A.2d 1262, 1271 (Del. 2010). The trial court had expressed concern that plaintiff's causation expert had not been aware of plaintiff's prior back condition and treatments for pain. *Id.* at 1266. The plaintiff argued that the trial court should have denied defendants' motion *in limine* because the problem with the expert's testimony "goes to the 'weight and credibility of the testimony rather than the admissibility.'" *Id.* at 1267. After mentioning the 2000 Amendment to Federal Rule 702, the *Perry* Court held that this issue was controlled by the following language from the Advisory Committee Notes to the 2000 Amendment: "the question whether the expert is relying on a sufficient basis of information—whether admissible information or not—is governed by the requirements of Rule 702." *Id.* at 1268. The Court next referenced language from the *Federal Rules of Evidence Manual*:

> If an expert has engaged in insufficient research, or has ignored obvious factors, the opinion must be excluded. . . . In other words, the expert must have a sufficient foundation for the testimony. . . . The Advisory Committee recognized that there was a gap in the Rules, and also that the Court in *Daubert* implicitly required a foundation requirement for expert testimony.
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> *Id.* (quoting 3 Stephen A. Saltzburg, et al., *Federal Rules of Evidence Manual* § 702.02[10], at 702-48 (8th ed. 2002)).

Applying these principles, the *Perry* Court found that "[w]eight and credibility challenges . . . relate to an expert's skill or knowledge in being able to tie the facts of the case to the opinion he or she plans to give." *Id.* at 1270. Accordingly, the Court concluded that the lower court had properly held that the expert "did not have a correct understanding of the facts of the case, thereby completely undermining the foundation of his expert opinion and not merely his credibility." *Id.* at 1271.

(3) Qualification by Experience

In a products liability action where plaintiff alleged that a window manufacturer and the window seller were liable for leaking windows, the Mississippi Supreme Court considered whether a proposed expert was qualified based on his experience as a general contractor. *McKee*, 64 So.3d at 934-35. The Court first clarified that "[w]ithout question, '[a] witness may qualify to give an expert opinion through his experience only.'" *Id.* (quoted citation omitted). However, while the expert's "twenty-four years of experience as a general contractor likely would have qualified him as an expert in the broad field of general contracting," he was not offered "as an expert in that general field, but rather in the specific field of window manufacture and design, assessing the purported defectiveness of the subject windows." *Id.* at 935. Here, the expert had admitted "that he had no special education, training, or experience specific to windows, and he had never worked for a window manufacturer or seller." *Id.* The Court therefore decided "this case [is] fundamentally distinguishable from those cases in which a witness was qualified as an expert by experience." *Id.* (citations omitted).

In *Rodriguez v. State*, however, the Delaware Supreme Court held recently that the trial court did not abuse its discretion in finding that a latent fingerprint examiner was qualified to testify as an expert in tire track and shoeprint analysis. 30 A.3d 764, 770 (Del. 2011). The *Rodriquez* Court explained that it had "adopted the interpretation of [Delaware] Rule 702 set forth by the United States Supreme Court in *Daubert* and *Kumho Tire* for Federal Rule of Evidence 702." *Id.* at 768-69 (citing *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 522 (Del. 1999)). The Court then quoted language from *Kumho Tire* providing that "[t]he purpose of the trial judge's gatekeeping role 'is 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.'" *Id.* at 769 (quoting *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)).

The *Rodriguez* Court pointed out that the expert had participated in an FBI course of instruction that covered tire track and shoeprint analysis, had independently studied a leading treatise on the discipline, and had previously testified on the analysis of tire tracks and shoeprints in Delaware courts. *Id.* at 769. The expert "also demonstrated knowledge of the variables that would affect impression, including the type of surface and degree of tire inflation." *Id.* Based on these facts, the Court found that the witness's expertise in fingerprint analysis was relevant to his experience with impression evidence: "[w]hile tire track and shoeprint

analysis may be viewed as a distinct forensic discipline from fingerprint analysis because it involves mass-produced items, the analytic process is similar." *Id.* "Specifically, tire tracks, shoeprints, and fingerprints are all forms of impression evidence." *Id.* at 769-70. The Court thus decided that "while [the expert's] substantial experience in fingerprint analysis does not alone support his admission as an expert in other forms of impression analysis, the trial judge did not abuse his discretion in considering that experience and training as relevant." *Id.* at 770.

(4) **Permissive Application of *Daubert***

Similar to some *Frye* jurisdictions, courts in certain states undergo a relatively more permissive *Daubert* analysis. For instance, the Indiana Supreme Court recently provided some background on Indiana Evidence Rule 702 and *Daubert* in *Turner v. State*, 953 N.E.2d 1039, 1049-50 (Ind. 2011). The *Turner* Court explained that "*Daubert* concerns the application of Federal Rule of Evidence 702," which is "somewhat different" than Indiana Evidence Rule 702. *Id.* at 1050. The Court "therefore [considered] *Daubert* helpful, but not controlling, when analyzing testimony under Indiana Evidence Rule 702(b)." *Id.* Additionally, "in light of the differences between Indiana Rule 702 and Federal Rule 702, we have previously declined to follow *Kumho Tire* in applying the *Daubert* reliability analysis to non-scientific expert testimony." *Id.* (citations omitted). According to the *Turner* Court, adoption of Indiana Rule 702 "reflected an intent to liberalize, rather than to constrict, the admission of reliable scientific evidence." *Id.* Indeed, "[e]vidence need not be conclusive to be admissible. 'The weakness of the connection of the item [of evidence] to the defendant goes toward its weight and not its admissibility.'" *Id.* (quoting *Owensby v. State*, 467 N.E.2d 702, 708 (Ind. 1984)).

To support his contention that the State's expert failed to satisfy the requirements of *Daubert*, Turner proposed what the Court considered "in essence, a 'fit' argument." *Id.* at 1051. The Indiana Court rejected this argument, stating that "*Daubert* is merely instructive in Indiana, and we do not apply its factors as a litmus test for admitting evidence under Indiana Evidence Rule 702(b)." *Id.* The *Turner* Court then stated:

> it is not dispositive for our purposes whether [the expert's] theory or technique can be and has been tested, whether the theory has been subjected to peer review and publication, whether there is a known or potential error rate, and whether the theory has been generally accepted within the relevant field of study.
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> *Id.* Further demonstrating the permissive nature of Indiana's *Daubert* analysis, the Court acknowledged that the expert's conclusion was "equivocal." *Id.* "And when pressed during the pretrial hearing [the expert] could not cite any article, study, or anecdotal report in which an examiner was able to make the linkage [the expert] made." *Id.* On direct examination at trial, the expert in *Turner* had "described his additional 'testing' in very informal terms. . . . Also, [the expert] could not recall specifics of the study he claimed to have read supporting his finding." *Id.* Despite these problems, the Indiana Supreme Court found that the "uncertainty" of the expert's opinion, "as well as the lack of formal testing and his inability to pinpoint other research, all inform the fact finder's judgment on weighing this evidence, but does not render the evidence inadmissible." *Id.*

***(5) Daubert* Objections**

In another Mississippi product-liability case that involved an allegedly defective automobile, the plaintiffs argued that the automobile manufacturer had not preserved error for appeal because "no proper *Daubert* challenges were made prior to trial or during trial." *Hyundai Motor America v. Applewhite*, 53 So.3d 749, 754 (Miss. 2011). While the manufacturer conceded that it never sought pretrial exclusion of the expert testimony, it did object to the testimony at trial and raised the reliability issue in its motion for a directed verdict and again in its post-trial motion for judgment notwithstanding the verdict. *Id.* In response, the *Applewhite* Court explained that "[w]hile the trial judge has discretion with regard to when and how to decide whether an expert's testimony is sufficiently reliable to be heard by a jury, this does not eliminate the requirement that the party opposing the evidence make a timely objection to its being admitted into evidence. *Id.* at 755 (citing Mississippi Rule of Evidence 103(a)(1)). The expert witness at issue in *Applewhite* had already left the witness stand when the manufacturer moved to strike his testimony under Mississippi Rule of Evidence 702 and *Daubert*. *Id.* Consequently, the trial judge "refused to grant the motion, stating that the 'cow [was] out of the barn.' In other words, the trial judge rightly refused to strike [the expert's] testimony because the defendant had failed to

make a contemporaneous objection and the testimony was already before the jury." *Id.* (citation omitted).

On the other hand, the *Applewhite* Court found that the manufacturer had raised a timely *Daubert* objection to the testimony of a different expert, plaintiff's design engineer. *Id.* After the engineer had testified to his qualifications, but before he had given his expert opinions, the manufacturer argued to the trial judge that he was not qualified to render opinions on the automobile's design. *Id.* After the judge overruled the objection and the engineer had testified regarding his methodology, the manufacturer objected again and argued that the engineer's opinion was not based on "reliable principles and methods," but the trial court ultimately found the testimony sufficiently reliable. *Id.* at 756. Because the manufacturer had filed a timely objection with respect to the engineer expert, the Mississippi Supreme Court considered the reliability of that expert's testimony. *Id.* However, the Court found that the manufacturer had argued essentially that the engineer should not have relied on first expert's reconstruction and opinions regarding the severity of the crash. *Id.* The Court would therefore need to consider the first expert's reliability, and the Court had already decided that the manufacturer had failed to timely object to the first expert's testimony. *Id.* The Court ultimately declined to find any error, because this argument was, "in actuality, another attempt to attack the validity of [the first expert's] testimony. . . ." *Id.*

(6) Damages Expert

The plaintiffs in *Bayer CropScience LP v. Schafer* proposed expert testimony on past and future economic damages resulting from the defendant's negligent contamination of the United States' rice supply. 2011 Ark. 518, ---S.W.3d ----, at *1 (Ark. Dec. 8, 2011). The Arkansas Supreme Court first referred to its adoption of the *Daubert* analysis in *Farm Bureau Mut. Ins. Co. of Ark. v. Foote*, 14 S.W.3d 512 (Ark. 1993), and explained that "[under] *Foote* and *Daubert*, a circuit court must make a preliminary assessment of whether the reasoning or methodology underlying the expert testimony is valid and whether the reasoning and methodology used by the expert has been properly applied to the facts in the case." *Id.* at *17 (citation omitted).

Regarding proof of damages, the Arkansas Court explained "that a plaintiff must present proof that would enable a jury to fix damages in dollars and cents, and damages will not be allowed which are speculative, resting only upon conjectural evidence of the opinion of the parties." *Id.* at *18 (citations omitted). "But this court has also stated that in those instances where damages simply cannot be proven with exactness, when the cause and existence of damages have been established by the evidence, recovery will not be denied merely because the damages cannot be determined with exactness." *Id.* (citation omitted). The expert in *Bayer CropScience* was an economic and financial analyst, a certified public accountant, an attorney, and an engineer. *Id.* He testified that his analysis revealed a linear relationship between the prices of world rice and Arkansas rice, and based on this relationship, he had calculated past losses using a "the classical ordinary-least-squares regression model." *Id.*

In allowing the expert's testimony regarding future damages, the Arkansas Supreme Court stated that he "based his estimates of future damages on his calculations of past damages, which [the defendant] does not contend are unreliable." *Id.* at *19. The expert "used those past-damages figures to extrapolate future losses, based on his judgment that the price of Arkansas rice would continue to lag behind the world price for a minimum of two years." *Id.* According to this Court, the expert had therefore "explained the bases for his opinions. Any weakness in the factual underpinning of an expert's opinion may be explored on cross-examination, and such a weakness goes to the weight and credibility of the expert's testimony." *Id.* (citations omitted).

(7) Class Certification

Addressing whether evidence was sufficient for class certification in a land damages class action, the Supreme Court of Colorado found that its case law did not "require a trial court to determine, at the class certification stage, whether the expert testimony will be admissible at trial." *Jackson v. Unocal Corp.*, 262 P.3d 874, 886 (Colo. 2011). At this stage, "the issue for the trial court is whether the expert testimony establishes a C.R.C.P. 23 requirement to its satisfaction." *Id.* Therefore, the approach in Colorado "does not mandate a *Shreck* hearing with its full evidentiary and legal arguments at the class certification stage." *Id.* Significantly, the Colorado Court recognized that its holding "differs from at least two federal appellate court cases," and provided the following summary:

> In *Sher v. Raytheon Co.*, the Eleventh Circuit held that a trial court erred by failing to determine the admissibility of expert testimony pursuant to

> *Daubert* . . . at the class certification stage. [419 Fed. Appx. 887, 890 (11th Cir. 2011)]. Similarly, in *American Honda Motor Co., Inc. v. Allen*, the Seventh Circuit held that "when an expert's report is critical to class certification, . . ., a trial court must conclusively rule on any challenge to the expert's qualifications or submissions prior to ruling on a class certification motion." [600 F.3d 813, 815-16 (7th Cir. 2010)]. That is, in the Seventh Circuit, district courts must hold a full *Daubert* hearing prior to class certification. [*Id.* at 816].
>
> *Unocal Corp.*, 262 P.3d at 886. The Court reiterated: "[w]e do not mandate such a requirement in Colorado." *Id.*

After finding that a *Daubert*-like hearing was not required, the *Unocal Corp.* Court explained further that "after certification, a trial court may hold a *Shreck* hearing and determine whether the plaintiff has an admissible class-wide theory of proof that can be presented at trial." *Id.* at 887. "After all, if the expert testimony is ultimately deemed inadmissible under *Shreck*, the plaintiff may be unable to present common questions at trial, thereby requiring the trial court to decertify the class." *Id.*

(8) 2012 Federal Daubert Decisions

In 2012, multiple interesting *Daubert* decisions have already been made by federal courts. For example, the Tenth Circuit has recently demonstrated its reluctance to overturn district courts' *Daubert* decisions: "[t]o the district court's application of *Daubert*, we 'afford *substantial deference*' and do not disturb its decision without 'a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Cornwell v. Union Pacific R.R.*, No. 10-5151, 2012 BL 371, at *7 (10th Cir. Jan. 3, 2012) (quoting *Hollander v. Sandoz Pharm. Corp.*, 289 F.3d 1193, 1203-04 (10th Cir. 2002)). The *Cornwell* Court was convinced that the district court had not abused its discretion in excluding three of plaintiff's experts in a wrongful death action in which the decedent's husband alleged Union Pacific's negligent, reckless, and intentional wrongdoing in the operation and maintenance of a locomotives' horn as well as in the construction and maintenance of a railroad crossing. *Id.* at *1-2.

The First Circuit has also recently upheld a district court's decision to exclude expert testimony. *See Samaan v. St. Joseph Hosp.*, No. 11-1480, 2012 BL 3582 (1st Cir. Jan. 9, 2012). In *Samaan*, the Court focused on the relevancy of the expert's opinions as opposed to reliability, stating, "[i]n the world of the blind, the one-eyed man is king; and *Daubert* relevancy is the sentry that guards against the tyranny of experts." *Id.* at *27-28. At issue were the causation opinions of plaintiff's expert, Dr. Tikoo, in a medical malpractice action. *Id.* at *22. The plaintiff argued that "Dr. Tikoo's qualifications were impressive and that his statistical methods were "comfortably within the realm of acceptable science." *Id.* Though the Court did not mention *Frye*, these arguments resemble the type of evidence that arguably may be admissible under a typical *Frye* test. Under *Daubert*, however, the First Circuit responded to plaintiff's argument by explaining that the lower court "did not seriously question either Dr. Tikoo's credentials or the reliability of his methods; the problem, as the court saw it, was that the results produced through that methodology left an analytical gap." *Id.* Consequently, the lower court's finding was "about the inadequacy of the fit; and in reviewing it, we can for the most part leave to one side the expert's qualifications, his numerical calculations, and the scientific community's acceptance of the study on which he relied." *Id.* Rejecting Dr. Tikoo's conclusion that the plaintiff more likely than not would have recovered had he received the drug t-PA based on his odds ratio analysis, the Court found "that while the odds ratio analysis shows that a t-PA patient may have a better chance of recovering than he otherwise would have had without t-PA, such an analysis does not show that a person has a better than even chance of avoiding injury if the drug is administered." *Id.* at *25-26. For further emphasis, the Court stated: "*Daubert* demands relevancy, and Dr. Tikoo's testimony falls short of this requirement. As a result it does not support a finding of causation under Maine law. The testimony was, therefore, inadmissible under *Daubert* and Rule 702." *Id.* at *27.

The District Court of Massachusetts recently provided another interesting *Daubert* decision in *Bricklayers & Trowel Trades Intl. Pension Fund v. Credit Suisse First Boston*, No. 02-12146-NMG, 2012 BL 9988 (D. Mass. Jan. 13, 2012). In excluding the expert's opinion, the Court stated: "[u]ntil now, no expert has been precluded from testifying in this Session of the United States District Court for the District of Massachusetts." *Id.* at *19. The Court stressed its tendency to trust the jury with expert testimony in all but the most extreme circumstances: "[t]his judicial officer is inclined to let experts testify. The crucible of cross-examination is

the usually best way to assess the reliability of expert testimony." *Id.* According to the *Bricklayers* Court, "[j]uries are the hallmark of our legal system and they deserve far more credit than they are given to discern the truth though the fog of competing expert testimony." *Id.* Despite this strong opinion in favor of a permissive gatekeeping role, the Court held: "[g]iven, however, the pervasiveness of Dr. Hakala's methodological errors and the lack of congruity between his theory and the data, the Court is compelled to exercise its role as gatekeeper and to exclude his event study as unreliable." *Id.*

In *Bricklayers*, the named plaintiff in a securities class action offered the expert testimony of Dr. Hakala to support fraud claims of a class of individuals who purchased common stock of AOL-Time Warner. *Id.* at *1. The theory of recovery in this case involved a fraud-on-the-market scenario where the defendants allegedly had made overly optimistic and intentionally misleading reports artificially inflating the stock price of AOL-Time Warner. *Id.* at 3. As plaintiff's expert, Dr. Hakala prepared an event study to measure the impact of these allegedly fraudulent statements and omissions. *Id.* at *4. The Court explained that an event study "is an accepted method of measuring the impact of alleged securities fraud on a stock price and often plays a 'pivotal' role in proving loss causation and damages in a securities fraud case." *Id.* at *5-6 (quoting *In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1272 (N.D. Okla. 2007). The expert's use of a generally accepted method may have satisfied a strict application of the *Frye* test in a state still applying *Frye*, but the federal Court had no reason to mention that possibility. The Court did state, however, that "there is no great dissention in the financial econometric community about how to conduct a proper event study." *Id.* at *6. It therefore appears that the manner in which Dr. Hakala performed a "generally accepted" event study, rather than the study itself, was the aspect of his testimony that the Court found objectionable.

In its analysis, the *Bricklayers* Court considered defendants' four arguments against the admissibility of Dr. Hakala's testimony: (1) that he studied the wrong "event days," (2) that he overused "so-called 'dummy variables,'" (3) that he disregarded prior disclosures, and (4) that he failed to control for "confounding factors." *Id.* at *8. Regarding the appropriate "event days," the Court explained that "an economist should select as the event days to be studied the days the allegedly fraudulent misrepresentations were made and the days the market learned the truth." *Id.* at *9. While Dr. Hakala admitted he had not proceeded in this fashion, the Court found that his unconventional approach "does not necessarily subvert his study. . . . It does, however, compel this Court to scrutinize his selection of event days." *Id.* While scrutinizing Dr. Hakala's selection of event days, the Court found his event study to be "replete with event days that appear to have been selected more for their volatility than for their actual relationship to defendants' alleged fraud." *Id.* at *10. The *Bricklayers* Court thus concluded "as did United States District Judge Rya Zobel in *In re Xcelera.com Sec. Litig.*, No. 00-11649-RWZ, 2008 WL 7084626, at *2 (D. Mass. Apr. 25, 2008), that '[q]uite simply, [Dr. Hakala's] theory does not match the facts." *Id.* at *11 (alterations in original).

In addition to adopting a judge's prior conclusion regarding the same expert's choice of event days, the Court's analysis of Dr. Hakala's use of dummy variables suggests that it felt compelled by earlier decisions in other jurisdictions involving Dr. Hakala. In fact, the Court found that "this is not the first time that Dr. Hakala has been criticized for overusing dummy variables." *Id.* at *12 (referring to *Xcelera.com* and *In re Northfield Labs., Inc. Sec. Litig.*, 267 F.R.D. 536, 548 (N.D. Ill. 2010)). In both of those decisions, the courts "excluded Dr. Hakala's event studies after concluding that his overuse of dummy variables rendered them unreliable." *Id.* In *Bricklayers*, Dr. Hakala used dummy variables for "a greater number of days and a higher percentage of the study period . . . than he did in event studies in *Northfield* and *Xcelera*." *Id.* at *12-13. As a result, the Court in *Bricklayers* found: "[i]f those courts were correct in excluding his event studies . . ., as this Court believes they were, it follows a fortiori that his event study should be excluded here." *Id.* at *13.

Next, the *Bricklayers* Court addressed the defendants' "prior disclosures" and "confounding factors" arguments. With respect to prior disclosures, the Court found: "Dr. Hakala's event study is also unreliable because it repeatedly ignores the efficient market principle. . . . Plaintiffs may not at the same time presume an efficient market to prove reliance and an inefficient market to prove loss causation." *Id.* at *14-15. Turning to the "confounding factors" argument, the Court stated that "confounding factors pervade Dr. Hakala's event study" because on many event days information on AOL's business was released from many different sources, and some information was positive while some was negative. *Id.* at *17. The issue, however, was "not just that many event days are hopelessly confounded and not readily attributable

to the defendants' misconduct; it is, more importantly, that Dr. Hakala made unreasonable judgments about which factors likely caused stock price movement on event days." *Id.* at *17-18. Despite concluding that Dr. Hakala should be excluded, the Court again demonstrated its preference to allow experts to testify in almost every circumstance: "[h]ad Dr. Hakala's event study suffered from only one of the four methodological defects identified by this Court, or suffered from those flaws jointly but to a lesser degree, today's ruling might have been different." *Id.* at *19.

A couple of other federal *Daubert* decisions in 2012 have demonstrated the *Frye* test's continued impact, even under *Daubert* analysis. Echoing *Frye* in a product liability context, the District Court of Minnesota recently held the following: "[f]rom the description of Hansen's testing methodology, the Court is satisfied that, for purposes of the *Daubert* standard, Hansen reached his conclusions using a generally accepted methodology." *CIC Partners v. Sunbeam Products, Inc.*, No. 09-3274 (SRN/SER), 2012 BL 11262, at *10 (D. Minn. Jan. 12, 2012); *see also AMW Sports, LLC v. State Farm Fire & Casualty Co.*, No. 10-651-SCR, 2012 BL 3464, at *6 (M.D. La. Jan. 9, 2012) (finding that "Plaintiffs have not shown that [the expert's] methodology is generally accepted in the insurance industry to determine whether to pay a substantial business or commercial loss claim when the insured has invoices and receipts which can be compared to what is listed in the Proof of Loss"). While *Frye's* "generally accepted" standard remains a factor under *Daubert*, the persuasiveness of the *Frye* test is evident in the courts' couching their conclusions in *Frye*-like language.

In *CIC Partners*, the action arose out of an apartment fire that was allegedly caused by a Sunbeam heating pad, which had not been turned on or used for a period of several weeks before the fire. *Id.* at *1-2. Sunbeam sought to exclude the opinions of plaintiff's experts, Paul Hansen and Ronald C. Rahman, on the grounds that they "failed to use reliable methodology in investigating the fire and in rendering their opinions." *Id.* at *7. Addressing Hansen's proffered opinion first, the Court found "it sufficiently reliable to be admitted under Rule 702 and *Daubert*." *Id.* at 9. The Court reasoned that "Hansen reached his conclusions using a generally-accepted methodology" because "his examination of the fire scene 'proceeded along the general guidelines as outlined in NFPA 921 and other guidelines typically used in the fire investigation profession." *Id.* at *10. Despite the fact that "Hansen may not have performed every method of fire scene investigation set forth in NFPA 921," the Court found that he "appears to have utilized many of the techniques set forth in the guidelines." *Id.* Given the Court's satisfaction with the use of generally accepted guidelines despite Hansen's suspect adherence to such guidelines, the analysis appears to further stray toward *Frye* and away from *Daubert*. Likewise, the Court's analysis of Rahman's expert opinions blurs the distinction between *Daubert* and *Frye*. Rahman had testified that "when investigating fires, he *tries* to follow the NFPA guidelines, using the scientific method." *Id.* at * 15 (emphasis added). The Court did not mention whether Rahman followed such guidelines during *this* investigation. Although the proponent of expert testimony supposedly must show its reliability, the *CIC Partners* Court explained that there was "nothing about his approach that demonstrates unreliability or some unusual, or innovative departure from techniques used by fire investigators." *Id.* "That Rahman does not describe each step of his methodology in lock-step with the NFPA 921 guidelines is not fatal to the admissibility of his testimony." *Id.*

In contrast to *CIC Partners*, the Middle District Court of Louisiana excluded plaintiff's expert because it had not shown that the expert's "methodology is generally accepted in the insurance industry. . . ." *AMW Sports*, 2012 BL 3464 at *6. In this case, the expert Kermith Sonnier opined that "the Proof of Loss that was submitted by Claimant is correct in accordance with the policy of insurance and should be timely paid by State Farm." *Id.* at *3. The Court, however, found his methodology "fatally flawed," where he "essentially reached his ultimate opinion by ignoring the insured's, i.e. plaintiff AMW Sports, LLC's, business records. Sonnier simply concluded that the Proof of Loss statement was sufficient." *Id.* at *4. Thus, the Court found Sonnier's failing to compare the Proof of Loss with available invoices and receipts rendered his opinions unreliable and his methodology inconsistent with generally accepted methods of the insurance industry. *Id.* at *6-7.

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Whether representing a Fortune 500 company or one of the largest municipalities in Tennessee, Jessie Zeigler has returned successful results for 100 percent of the cases she has handled for clients in a wide range of litigation matters. Her counsel has saved clients millions in losses across various industries – including automotive, food and beverage, healthcare, consumer products, pulp and paper, general manufacturing, chemical, pharmaceutical/ life sciences, and medical device – as they have faced claims related to crisis management, environmental, health & safety, products liability, healthcare liability, or contracts.

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