WHAT YOU NEED TO KNOW ABOUT ALABAMA’S
NEW RULE 702 DAUBERT-BASED ADMISSIBILITY

STANDARD FOR EXPERTS

Dana G. Taunton
Mandy L. Pinkard
BEASLEY, ALLEN, CROW, METHVIN,
PORTIS & MILES, P.C.
218 Commerce Street
Post Office Box 4160
Montgomery, Alabama 36103-4160
(334) 269-2343
# TABLE OF CONTENTS

I. **INTRODUCTION** ............................................................................................................... 1

II. **ALABAMA'S GENERAL "ADMISSIBILITY REQUIREMENTS" FOR ALL EXPERT TESTIMONY** .............................................................................................................. 3

   A. Qualifying The Witness As An Expert........................................................................... 3

   B. Determining Whether A Witness's Scientific, Technical, Or Other Specialized Knowledge Will Assist The Trier Of Fact....................... 4

III. **ALABAMA'S "DAUBERT REQUIREMENTS" FOR SCIENTIFIC EXPERT TESTIMONY AND EVIDENCE** .............................................................................................................. 5

   A. The Trial Court's Gatekeeping Function....................................................................... 6

   B. Alabama's Three Daubert Requirements For Scientific Testimony And Evidence.......................................................... 7

      1.) *The Testimony Must Be Based On Sufficient Facts or Data* ......................... 7

      2.) *The Testimony Must Be The Product Of Reliable Procedures Or Methods* ................................................................................................................................. 8

      3.) *The Expert Witness Must Apply The Procedures Or Methods Reliably To The Facts Of The Case* ................................................................. 10

IV. **DETERMINING WHAT IS "SCIENTIFIC EVIDENCE" UNDER ALABAMA LAW.** ........ 11

V. **CONCLUSION.** ........................................................................................................... 16
I. INTRODUCTION

By now everyone is aware that in 2011 the Alabama Legislature adopted a new admissibility standard for expert testimony. The stated goal of the legislation was to help the court system achieve the most reliable, credible, and just process for all who appear before them. The Alabama Legislature passed Act No. 2011-626, which amended Alabama Code Section 12-21-160 (1975) to reflect Daubert’s basic principles. Over the past two decades, the United States Supreme Court’s 1993 decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., has transformed judicial decisions involving law, science, and the admissibility of expert testimony. As the Supreme Court noted in Daubert, “[t]he Rule’s basic standard of relevance [was] a liberal one.” Daubert, 509 U.S. at 587. Thus, the purpose of Rule 702 was to relax and liberalize the standards for admissibility of expert testimony. However, instead of relaxing and liberalizing the admissibility of expert testimony, the adoption of Daubert has instead turned the admissibility of expert testimony into mini-trials. Stakes are high in these Daubert battles because one bad Daubert ruling on an expert can effect that expert’s credibility in future cases. Because of these high stakes, costs of cases have greatly increased. Experts, rightly sensitive to a potential adverse ruling, sometimes require a party to pay for expensive (sometimes unnecessary) testing in order to insure that a party can show a federal judge that the Daubert criteria have been met.

It has been against this background that Alabama has debated whether it should retain the “general acceptance” standard enunciated in Frye v. United States back in 1923 or whether the Frye standard, as it became known, should be abandoned in favor of Daubert. In 2011, the debate ended with the Legislature’s adoption of a limited form of Daubert. The Alabama
Supreme Court followed by amending Rule 702 of the *Alabama Rules of Evidence* in an effort to “promote uniformity and avoid confusion.”

As a result of these amendments, expert testimony proffered in civil court actions that are filed on or after January 1, 2012, are subject to the new Rule 702 and what has been properly dubbed the “Daubert-based” admissibility standards. The new standards have been described as “Daubert-based,” because in amending the rules for expert testimony, Alabama did not adopt the entire “Daubert trilogy” as it has been adopted in federal courts. Because Alabama did not adopt the federal standards in whole, there is no doubt that Alabama’s new Rule 702 will come with questions of interpretation and application of when and who this limited form of Daubert applies to. This paper is intended to help you understand how Alabama’s new Daubert-based standards will be applied and to help recognize, apply and argue the most significant difference between Alabama’s version and the federal courts’ version- i.e. that Alabama’s version of *Daubert* is limited to only “scientific” evidence in civil cases.

In relevant part, *Alabama Rule of Evidence* 702 now states:

(a) 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.

(b) If addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if:

(1) The testimony is based on 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.
The easiest way to comprehend Alabama’s new Daubert rule is to think of each subsection of Rule 702 as separate analysis that the court must conduct to determine whether a particular expert’s testimony will be admissible in any given case. Subsections (a) and (b) should be thought of separately as “Admissibility Requirements” and “Daubert Requirements,” respectively.9 There will be some occasions where once the Admissibility Requirements have been met; there will be no need to perform an additional analysis of the Daubert Requirements. This determination will fall solely on the presence or absence of “scientific” evidence or testimony.

II. ALABAMA’S GENERAL “ADMISSIBILITY REQUIREMENTS” FOR ALL EXPERT TESTIMONY

The most notable feature of Alabama’s Admissibility Requirements under Alabama Rule of Evidence 702(a) is that Section (a) is actually the previous Rule 702 in its entirety. Thus, applying this Section, which is a prerequisite to the admission of all expert testimony, is a relatively simple process that Alabama courts are extremely familiar with. The analysis can be completed by answering two questions:

- Is the witness qualified as an expert? and
- Will the witness’ scientific, technical, or other specialized knowledge assist the trier of fact?

A. Qualifying The Witness As An Expert

First, the expert witness must be “qualified” as an expert. The Alabama Supreme Court has concluded that the determination of whether a witness is qualified to give an expert opinion falls within the broad, sound discretion of the trial court.10 The trial court’s decision on this issue is not disturbed on appeal except in cases of “palpable abuse.”11 To establish that a witness is
qualified to provide expert testimony on a particular topic, it must be shown that the witness is familiar with the topic upon which he is asked to give an opinion. Thus, it is essential to establish the expert’s qualifications by demonstrating to the court that the expert has the requisite knowledge, skill, training, etc., to provide opinions in the area in which he is testifying. However, remember that Alabama courts have noted that the witness need not be “totally versed” in all areas of the field in which he seeks to testify.\textsuperscript{12} Regardless, an objection in court for the failure to lay a proper predicate will usually be sustained where counsel has not elicited from the witness his qualifications with respect to the area in which the expert seeks to testify.\textsuperscript{13}

**B. Determining Whether A Witness’s Scientific, Technical, Or Other Specialized Knowledge Will Assist The Trier Of Fact**

Although a trial court may determine that a witness is qualified to provide expert testimony, the expert’s testimony may nevertheless be excluded if the court determines that it will not “assist the trier of fact.” The Advisory Committee to the prior version of Rule 702 explained that, while this concept is by no means new to a Rule 702 analysis, over the years there has been somewhat of a shift in the focus of this phrase; however, even under the new *Daubert* rule, the analysis should not depart from prior understandings of the phrase.

“Historically, expert witnesses have been permitted to give opinions upon subjects that are held to be beyond the understanding of the average layperson.”\textsuperscript{14} This is a common law principle derived from the theory that jurors are just as capable and qualified to draw their own conclusions on subjects of common knowledge as an expert would be. Thus, allowing an expert to provide testimony on such subjects of common knowledge would ultimately usurp the role of the jury. Over the years however Alabama courts have departed from this general position and have increasingly changed their focus from “whether the expert’s opinion or testimony is *beyond common understanding* to whether the expert’s opinion or testimony will *assist the trier of*
fact.” 15 Under this rule, it is possible that expert testimony on a question of common knowledge would be admitted as “helpful” to the trier of fact in understanding the evidence or deciding an issue of fact. 16 In Baker v. Edgar, the Alabama Supreme Court found prejudicial error in excluding an expert’s testimony on the point of impact between vehicles involved in an accident. 17 The Court explained that “... careful review of the record in this case reveals that the opinions of trained experts as to the point of impact of the automobiles involved in the subject collision would have been of great assistance to the members of the jury,” in light of the fact that the three eyewitnesses to the impact were interested parties and the factual evidence was susceptible to various interpretations. 18

III. ALABAMA’S “DAUBERT REQUIREMENTS” FOR SCIENTIFIC EXPERT TESTIMONY AND EVIDENCE

While all expert testimony must meet the “Admissibility Requirements” discussed above, the “Daubert Requirements” are only applicable to scientific experts and evidence. Therefore, if the evidence or testimony is considered nonscientific, the analysis will stop after the “Admissibility Requirements” have been satisfied. However, if the evidence or testimony is considered scientific, the new “Daubert Requirements” set out in Alabama Rule of Evidence 702(b)(1) through (3) will pose three more hurdles to the admissibility of expert testimony. Thus, the most crucial determination will be whether or not the evidence is considered scientific. Because of the importance of this determination, it will be discussed later (in Section IV of this paper) in more detail. At this point, it is sufficient to simply acknowledge that this determination would be made before the application of the following three “Daubert Requirements.”
Alabama Rule of Evidence 702(b)(1) through (3) requires that if expert testimony is based on scientific theory, principle, methodology, or procedure, (more simply stated, if the expert testimony is considered “scientific”) it is admissible if, and only if:

- The testimony is based on *sufficient facts or data*,
- The testimony is the product of *reliable principles and methods*, and
- The witness has *applied the principles and methods reliably to the facts of the case*.

These three requirements are identical to the requirements found in Federal Rule of Evidence 702, which was enacted in response to three leading opinions handed down from the United States Supreme Court concerning the admissibility of expert testimony. The “Daubert trilogy,” as the cases have been coined, consist of 1) *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 2) *General Electric Company v. Joiner,* and 3) *Kumho Tire Company v. Carmichael*.

A. The Trial Court’s Gatekeeping Function

A typical analysis under the new Daubert Requirements should first point out the significance and importance of the trial court’s gatekeeping responsibilities in regard to the determination of the admissibility of expert testimony. The Eleventh Circuit has pointed out that “[t]he importance of Daubert’s gatekeeping requirement cannot be overstated.” The overall objective of the gatekeeping function was set out in *Kumho Tire* by Justice Breyer: “to make certain that an expert . . . employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.” The trial court’s role in regard to the admissibility of expert testimony is especially significant since an expert’s opinion “. . . can be both powerful and quite misleading because of the difficulty in evaluating it. . . . Indeed, no other kind of witness is free to opine about a complicated matter without any firsthand knowledge of the facts in the case, and based upon otherwise inadmissible hearsay if the facts or
data are of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”

This gatekeeping role is in stark contrast from the role implicated under the *Frye* standard. Under *Frye*, the trial court’s role was to determine whether the underlying science of an expert’s opinion was “generally accepted” by the relevant scientific field. Under *Daubert*, the trial court must now make a more independent determination and no longer “defer to the scientific consensus on questions of scientific validity and reliability.” Because the trial court’s gatekeeping function now requires a more independent determination, it should come as no surprise that a three-part inquiry must be engaged in determining the admissibility of scientific expert testimony under Alabama’s new *Daubert* Requirements.

**B. Alabama’s Three *Daubert* Requirements for Scientific Expert Testimony And Evidence**

As previously noted, Alabama has amended *Alabama Rule of Evidence* 702 to include three *Daubert* Requirements that must be met before scientific expert testimony or evidence will be admissible. These three requirements are set out in *Alabama Rule of Evidence* 702(b)(1) through (3).

1.) *The Testimony Must Be Based On Sufficient Facts Or Data.*

The first requirement of scientific testimony or evidence is that it must be based on “sufficient facts or data.” It is presumed that prior Alabama case law will be instructive on this point, based simply on the federal court’s interpretation of this requirement. Federal courts have explained that, if the scientific testimony or evidence is *not* based on sufficient facts or data, then the testimony or evidence merely amounts to “pure speculation and conjecture.”
Fortunately, the same Alabama case law that has been cited and referenced for the court’s interpretation of whether testimony amounts to speculation and conjecture is most likely the same case law that will guide the court’s interpretation of this component requiring expert testimony to be based on sufficient facts or data. It is no secret that Alabama courts have long-recognized their ability to exclude expert testimony that it considers nothing more than speculation and conjecture. For example, in Townsend v. General Motors Corporation, the Alabama Supreme Court explicitly made clear that “[a] witness’s testimony cannot be based on mere speculation and conjecture.”28 In Alabama Power Co. v. Robinson, the Alabama Supreme Court elaborated on this principle as it relates to issues of causation: “[A]s a theory of causation, a conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference.”29 Similarly, it could be argued under the new Daubert Requirements that where an expert’s testimony simply offers an explanation that cannot be reasonably inferred from the facts and conditions that exist, the testimony amounts to pure speculation and conjecture, is not based on sufficient facts or data, and therefore does not meet the new standards of admissibility.

As a final cautionary note, when a trial court does determine that an expert’s testimony is reliable, it “does not necessarily mean that contradictory expert testimony is unreliable.”30 As the federal courts have demonstrated, testimony may be permitted even where it is the product of competing principles or methods in the same field of expertise.31

2.) The Testimony Must Be The Product Of Reliable Procedures or Methods.

At the very core of Alabama’s new Daubert test is the requirement that the scientific expert testimony or evidence be the product of reliable procedures or methods – in short, it must be reliable.32 Daubert instructs the trial court to focus this inquiry on the expert’s “principles and
methodology, not on the conclusions that they generate.”\textsuperscript{33} This prong of the Daubert Requirements has appropriately been characterized as the “scientific validity” prong of the Daubert analysis.\textsuperscript{34} The Daubert Court explained that Frye’s “general acceptance” test can have a bearing on the court’s inquiry under the new standards. However, “the inquiry envisioned by Rule 702 is . . . a flexible one.”\textsuperscript{35} Thus, general acceptance in the field is now considered as only one of many factors that a court may contemplate in making its determination.

In deciding whether the reasoning or methodology underlying the expert’s testimony is scientifically valid and whether that reasoning or methodology can be properly applied to the facts in issue, the United States Supreme Court has set forth a non-exhaustive list of factors for the trial court’s consideration:\textsuperscript{36}

\begin{enumerate}
  \item “Testing” -- Whether the theory or technique can be or has been tested -- that is, whether the expert’s theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability.
  \item “Peer Review” -- Whether the theory or technique has been subjected to peer review and publication
  \item “Rate of Error” -- Whether the theory or technique’s potential rate of error and standards controlling the technique’s operation are acceptable;
  \item “Standards and Controls” -- The existence and maintenance of standards and controls; and
  \item “General Acceptance” -- Whether the theory or technique has gained general acceptance in the relevant scientific community.
\end{enumerate}

Because the intent of Daubert was to create a flexible standard for admissibility, no effort by either the federal courts or state courts has been made to codify these specific factors. Thus, the potential factors a court may consider relevant to the expert inquiry is not limited to those specific factors listed above. Courts have consistently recognized that not all of these factors will
apply in every case.37 Courts have actually found, both before and after Daubert was decided, numerous factors to be relevant to their determinations. Some of these additional factors include:

(1) Whether the experts are “proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.”38

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.39

(3) Whether the expert has adequately accounted for obvious alternative explanations.40

(4) Whether the expert is being “as careful as he would be in his regular professional work outside his paid litigation consulting.”41

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.42

As a result, most courts have recognized that the trial court is still granted “considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.”43

3.) The Expert Witness Must Apply The Procedures or Methods Reliably To The Facts Of The Case.

Under Alabama’s new Daubert rule, trial courts must now scrutinize not only the principles and methods used by the expert but also whether those principles and methods have been properly applied to the facts of the case.44 This third prong of admissibility goes to a specific aspect of relevancy that has been termed “fit.” As described by the Daubert court, “fit is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.”45
The “fit” prong is not new to Alabama courts. By statute, “. . . the admissibility of scientific expert testimony based on DNA analysis has been governed by the test set forth in *Daubert* since 1994.” For example, in 1998 the Alabama Supreme Court applied the *Daubert* standard in *Turner v. State* in determining the admissibility of DNA evidence. As Professor Goodwin’s recent article addressing Alabama’s new *Daubert*-based admissibility standard points out, the *Turner* court likely provides instructive insight into the consideration that Alabama courts will give to the third prong of the *Daubert* Requirements:

Whether otherwise reliable testing procedures were performed without error in a particular case goes to the weight of the evidence, not its admissibility. Only if a party challenges the performance of a reliable and relevant technique and shows that the performance was so particularly and critically deficient that it undermined the reliability of the technique, will evidence that is otherwise reliable and relevant be deemed inadmissible.

*Turner* suggests that once a scientific expert’s methodology or procedure has been determined to be reliable, the burden will fall on the party opposed to the admission of the expert’s testimony or evidence to demonstrate that the expert’s application of the methodology or procedure was so deficient that it undermines the reliability. Otherwise, such criticisms of the testimony or evidence will bear only on the weight to be given to it by the jury, thus creating a proper subject to explore at trial through vigorous cross-examination.

### IV. Determining What Is “Scientific Evidence” Under Alabama Law

The most critical determination to be made before applying the *Daubert* Requirements will be to decide whether expert testimony or evidence is considered “scientific.” If it is scientific, the *Daubert* Requirements must be applied – if it is nonscientific, the analysis will end after the application of the general Admissibility Requirements that were previously discussed, i.e. Rule 702(a). The Advisory Committee Notes to the 2012 amendment expressly state that *Alabama Rule of Evidence* 702(b)’s language was added in response to the Supreme Court’s
decision in *Daubert*, and the “amendment adopts the approach taken in *Daubert* for determining the admissibility of *scientific evidence.*”\(^49\) As a result, Alabama’s application of the *Daubert* requirements will be significantly different from the federal courts’ applications of the *Daubert* requirements because in Alabama, *Daubert* will only apply to scientific evidence.

The difference stems from the Supreme Court’s holding in *Kumho Tire*, where the initial question before the Court was whether the basic gatekeeping obligation imposed by *Daubert* applied only to “scientific” testimony or to all expert testimony.\(^50\) The Supreme Court determined that the language of *Federal Rule of Evidence* 702 itself did not make a distinction between scientific knowledge, technical knowledge, or other specialized knowledge.\(^51\) Thus, any such knowledge might become the subject of expert testimony, and therefore the *Daubert* analysis in federal court is to be applied to all expert testimony regardless of whether or not it is considered scientific testimony.\(^52\) Interestingly, the Supreme Court reasoned in *Kumho Tire* that “. . . it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge. There is no clear line that divides the one from the others.”\(^53\) The difficulty expressed by the Court likely comes from the fact that there is no real guidance on making such determinations found in either *Daubert* or the *Federal Rules of Evidence*.

Regardless of the Supreme Court’s forecast that such efforts would be “difficult, if not impossible,” the Alabama courts will be tasked with making these precise determinations as Alabama’s new *Daubert* Requirements are applied. Neither the *Alabama Rules of Evidence* nor the Advisory Committee’s Notes provide any guidance on how these key distinctions should be made. Luckily, though, Alabama courts will not have to venture far in deciphering which types
of testimony or evidence are considered “scientific” and which are “nonscientific” because, for over fifty years, Alabama courts applied the *Frye* standard which, most simply stated, required the proponent of *scientific* evidence to demonstrate that the science underlying the evidence was “generally accepted” by scientists.\textsuperscript{54} Thus, determining what is and what is not scientific will not be a new role for Alabama courts. Instead, Alabama courts only need to consider the previous Alabama cases decided under the *Frye* standard. Like the new *Daubert* Requirements, the *Frye* standard also *only applied to scientific evidence*.\textsuperscript{55} As a result, there is over fifty years of Alabama judicial authority in existence to guide the court’s determination of whether or not any particular expert testimony or evidence should be considered scientific.

Historically, Alabama courts determined that the opinions offered by an expert were nonscientific if the expert based his opinion on his specialized knowledge or experience or to evidence in the nature of a physical comparison.\textsuperscript{56}

Cases have identified categories of evidence or expert testimony that is not considered to be scientifically based . . . . For example, *Frye* has been held inapplicable when the test applied is in the nature of a physical comparison accessible to the jury or when expert testimony is based upon the expert’s specialized knowledge and experience and is presented to the jury as the expert’s learned, but personal opinion.\textsuperscript{57}

For example, Alabama courts have found that expert opinions based on fingerprints, crime scene analysis or comparison of tool marks, bite marks, or shoe prints are not “scientific” evidence because they are not based on scientific tests or experiments.\textsuperscript{58}

Further, expert opinion is typically considered “non-scientific” when it is based upon the expert’s specialized knowledge offering the subjective, personal opinion of the expert based upon the expert’s experience and observations.\textsuperscript{59} For example, in *Simmons v. State*\textsuperscript{60}, the court explained:
Crime–scene analysis and victimology do not rest on scientific principles like those contemplated in *Frye*, these fields constitute *specialized knowledge* . . . . [B]ecause crime scene analysis is not scientific evidence . . . we are not bound by the test enunciated in *Frye*.

In distinguishing between “specialized knowledge” and “science,” the Court explained that “[s]pecialized knowledge offers subjective observations and comparisons based on the expert’s skill, training, or experience” and therefore the *Frye* standard did not apply.61

Similarly, in *Minor v. State*, the Alabama Court of Criminal Appeals considered whether a doctor’s testimony, which was based on the results of a blood test, was subject to the *Frye* standard.62 The Court pointed out that the defendant did not challenge the evidence of the hematocrit level in the blood or the testing procedure used to obtain the level; instead, his sole argument was that the doctor’s testimony, which consisted of his opinions based on his training and experience, was inadmissible.63 In rejecting the defendant’s argument, the Court reasoned that it was not necessary for the doctor’s testimony to satisfy the *Frye* requirements, because his testimony did not constitute novel scientific evidence.64 As a result, the Court held that, although the doctor’s testimony was *based* on scientific testimony (*i.e.*, the results of a blood test), his testimony itself was *not* scientific evidence.65 Instead, his testimony was merely his opinion based on his experience and training as a pediatric trauma surgeon.66

While there are numerous criminal cases making similar distinctions, the civil courts have also made their fair share of rulings concerning what is considered scientific evidence. One of the most cited cases is *Courtaulds Fibers, Inc.* v. *Long*.67 In *Courtaulds*, the Court considered whether a veterinarian’s testimony on the causes of the illness and death of horses was subject to *Frye*.68 In determining that the issue was controlled by Rule 70269 and not subject to the admissibility standards of *Frye*, the Court explained that the veterinarian’s opinions were derived
from his knowledge, skill, and training that he received through his years of experience, which was all that was required under the evidence rules.\textsuperscript{70}

Likewise, in \textit{Millry Mill Company v. Manuel}, the Alabama Court of Civil Appeals determined that the testimony of two treating and examining physicians regarding the cause of a worker’s compensation claimant’s neck injury was not “scientific” within the meaning of \textit{Frye}’s standard for admissibility when the physicians’ testimony was not based on scientific tests or procedures but rather on their own experience, knowledge, and expertise as physicians.\textsuperscript{71} A similar example is found in \textit{ArvinMeritor v. Johnson}.\textsuperscript{72} In \textit{ArvinMeritor}, the Court stated that “[g]enerally, a physician’s opinion is not subject to the \textit{Frye} test because it is opinion testimony, not scientific evidence. A physician’s opinion with respect to medical causation is generally not governed by the \textit{Frye} standard because for many, if not most, diseases, science has not yet clearly established causation and there is no generally accepted procedure to determine conclusively the etiology of the disease. In such cases, the physician’s opinion as to causation is as much an ‘art’ as a science, \textit{based on factors not quantifiable and derived, instead, from the witness’s overall experience, skill, and training as a physician.”\textsuperscript{73}

Finally, the Alabama Supreme Court’s holding in \textit{General Motors Corporation v. Jernigan} strongly suggests that the same considerations that have previously been used to distinguish between scientific and nonscientific evidence will carry on even though Alabama has now adopted the new \textit{Daubert}-based admissibility standards. In \textit{Jernigan}, the Alabama Supreme Court held that the plaintiff’s expert, an automotive-design engineer, was properly allowed to testify concerning design defect and alternative design in an action brought under the Alabama Extended Manufacturer’s Liability Doctrine.\textsuperscript{74} In rejecting General Motors’ arguments, the Court discussed the text of the previous Rule 702, which expressly contemplated that an expert
may be qualified on the basis of his experience.\textsuperscript{75} In fact, the Court recognized that “[i]n certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.”\textsuperscript{76} The Court held:

\begin{quote}
[C]learly [the expert’s] experience and expertise were factors the jury could properly consider in this case, \textit{regardless of whether we reviewed his testimony under the standard enunciated in Daubert or the standard enunciated in Frye.}\textsuperscript{77}
\end{quote}

It is apparent from this language that the Alabama Supreme Court’s determination in \textit{Jernigan} that the expert’s testimony was nonscientific would have likely been the same regardless of whether the analysis had been conducted under \textit{Frye}’s “general acceptance” standard or Alabama’s new \textit{Daubert} rule.

As a result, the long line of Alabama case law that was developed under \textit{Frye} remains instructive and will provide the courts with extensive guidance – and could perhaps be considered controlling in the future – in making the critical determination of whether expert testimony or evidence is considered “scientific” to trigger the application of \textit{Alabama Rule of Evidence 702(b)}’s \textit{Daubert} Requirements.

\section{V. \textbf{Conclusion}}

It comes as no surprise that, since \textit{Daubert}, federal courts have struggled to apply the standards that regulate expert testimony. While the purpose of the United States Supreme Court, via \textit{Daubert}, may have been to relax and liberalize the standards for the admissibility of expert testimony, instead its adoption has led to a series of “mini-trials” on expert issues and significantly slowed the process down in federal courts.

Hopefully, Alabama courts can avoid the mire that \textit{Daubert} and its prodigy has created in federal courts through its limitation of the \textit{Daubert} criteria to only \textbf{scientific} evidence in civil
cases. While Alabama courts have not yet had an opportunity to define scientific evidence under the new *Daubert* standard, over fifty years of Alabama case law decided under *Frye* remains in existence to guide the determination of whether or not any particular expert testimony should be considered scientific. An excellent resource that can guide you in arguing whether an expert’s testimony is or is not scientific is Professor Robert J. Goodwin’s “Fifty Years of Frye in Alabama: The Continuing Debate Over Adopting the Test Established.” It provides a compilation of Alabama cases where courts decided whether to apply *Frye* to the expert testimony before the court. I highly recommend this article should you be faced with a *Daubert* challenge or if you are contemplating filing a *Daubert* motion in your civil action.

---

1 The Honorable Ben H. Brooks, the sponsor of the legislative bill and now a circuit court judge in Mobile County, wrote an article entitled “*Alabama’s Version of Daubert – A Legislative History,*” in which the author provides detailed insight into the legislative process which led to the adoption of Alabama’s *Daubert* statute in the form it was adopted, wherein he explains that “[i]n drafting and sponsoring the *Daubert* bill, the sponsors believed that adopting a *Daubert* standard would promote the interests of the courts in pursuing a more reliable, credible, and just process.” (Hereinafter this article will be cited as “*A Legislative History.*”)


4 *Ala. R. Evid.* 702, Advisory Committee’s Notes.

5 In regard to criminal actions, the new *Alabama Rule of Evidence* 702 applies only in “nonjuvenile felony proceedings in which the defendant who is the subject of the proceeding was arrested on the charge that is the subject of the proceeding on or after January 1, 2012.” *Ala. R. Evid.* 702 Advisory Committee’s Notes.

6 The new standards for admissibility are described as “*Daubert*-based” in the excellent analysis and comparison of the *Frye* standard and Alabama’s new *Daubert* rule in Professor Robert J. Goodwin’s *An Overview of Alabama’s New Daubert-Based Admissibility Standard*, 73 ALA. LAW. 196 (2012) (hereinafter “Goodwin’s Overview”).

7 The “*Daubert* trilogy,” as the cases have been coined, consist of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, General Electric Company v. *Joiner*, and *Kumho Tire Company v. Carmichael*.

8 Notably, these provisions are consistent with *Alabama Code* Section 12-21-160, with only minor differences in wording.

9 For convenience and clarity, this paper will typically refer to *Alabama Rule of Evidence* 702(a) as the “Admissibility Requirements” and *Alabama Rule of Evidence* 702(b)(1)-(3) as the “*Daubert* Requirements.”

10 *Swanstrom v. Teledyne Cont'l Motors, Inc.*, 43 So. 3d 564, 580 (Ala. 2009); see also, *Townsend v. General Motors Corp.*, 642 So. 2d 411, 423 (Ala. 1994) (stating that “whether a particular witness will be allowed to testify as an expert is left to the sound discretion of the trial court”).
Id.; see also, Burroughs Corp. v. Hall Affiliates, Inc., 423 So. 2d 1343, 1353 ( Ala. 1982) (stating that “whether or not a particular witness will be allowed to testify as an expert is in the sound discretion of the trial court, whose decision will not be disturbed on appeal except for palpable abuse”).

See Kimmell v. Bailey, 409 So. 2d 767 ( Ala. 1981) (finding that the “trial court is not required to determine if a witness is totally versed in all areas of the field in which he is testifying as an expert before permitting him to testify.”).

See Lucky Mfg. Co. v. Activation, Inc., 406 So. 2d 900, 901-02 ( Ala. 1981) (explaining it was proper that “questions seeking Hawkins’ opinions of ‘the normal use expectancy of a pump in a hydraulic system of like kind,’ objection was first sustained for failure to lay a proper predicate, since counsel for Lucky had not at that point elicited from Hawkins his qualification with respect to hydraulic equipment.”)

Ala. R. Evid. 702, Advisory Committee Notes.

Id.

Woodward v. State, 2011 WL 6278294 ( Ala. Crim. App. Dec. 16, 2011), as modified on denial of reh’g ( Aug. 24, 2012) (stating that “the focus of the rule is not whether the subject matter of the testimony is within the common knowledge or understanding of the jurors, but whether the expert's opinion or testimony will assist the trier of fact in understanding the evidence or deciding an issue of fact”); see e.g., Price v. Jacobs, 387 So. 2d 172 ( Ala. 1980) (using the term “helpful” in ruling on admissibility of expert opinion); Glaze v. Thompson, 352 So. 2d 1335 ( Ala. 1977) (declaring that the test is whether the expert opinion will aid the trier of fact); see also, C. Gamble, McElroy’s Alabama Evidence § 127.01(5) (4th ed. 1991).


Id. at 970.

Daubert, 509 U.S. at 580.


U. S. v. Frazer, 387 F.3d 1244, 1260 ( 11th Cir. 2004).

Kumho Tire, 526 U.S. at 152.


See Goodwin’s Overview, supra note 6.

See Goodwin’s Overview, supra note 6.

See U.S. v. Day, 524 F. 3d 1361, 1368 (D.C. Cir. 2008) (“Scientific testimony is reliable if it is based on ‘scientific…knowledge.’ The adjective ‘scientific’ implies a grounding in the methods and procedures of science. Similarly, the word ‘knowledge’ connotes more than subjective belief or unsupported speculation.” In short, “[p]roposed testimony must be supported by appropriate validation – i.e., good grounds, based on what is known.”) (internal citations omitted).

Townsend v. General Motors Corp., 642 So. 2d 411, 423 ( Ala. 1994).

Alabama Power Co. v. Robinson, 447 So. 2d 148, 153-54 ( Ala. 1983); (citing Griffin Lumber Co. v. Harper, 25 So. 2d 505 ( Ala. 1946)).

Fed. R. Evid. 702, Advisory Committee Notes to 2000 Amendments.

See Heller v. Shaw Indus., Inc., 167 F.3d 146, 160 ( 3d Cir. 1999); In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 744 ( 3d Cir. 1994); Daubert v. Merrell Dow Pharm. Inc., 43 F.3d 1311, 1318 ( 9th Cir. 1995); Troche v. Pepsi Cola, 161 F.3d 77, 85 ( 1st Cir. 1998) (stating that “Daubert neither requires nor empowers the trial courts to determine which of several competing scientific theories has the best provenance”).

See Ala. R. Evid. 702(b)(2).


See id.; see also, Goodwin’s Overview, supra note 6.

Daubert, 509 U.S. at 594.

Id. at 593-94; see Fed. R. Evid. 702, Advisory Committee Notes to 2000 Amendments; see also, Turner, 746 So. 2d at 359 (applying the Daubert standard of admissibility to DNA evidence).

See Tyus v. Urban Search Mgmt., 102 F. 3d 256 ( 7th Cir. 1996) (noting that the factors mentioned from the Daubert Opinion do not neatly apply to expert testimony from a sociologist); see also, Allison v. McGhan Med. Corp., 184 F. 3d 1300, 1313 ( 11th Cir. 1999) (pointing out that “[p]ublication (which is but one element of peer review) is not a sine qua non of admissibility; it does not necessarily correlate with admissibility) (quoting Daubert, 509 U.S. at 593).
Fed. R. Evid. 702, Advisory Committee Notes on 2000 Amendments (citing Daubert v. Merrell Dow Pharm. Inc., 43 F.3d 1311, 1317 (9th Cir. 1995)).


Id. (citing Claar v. Burlington N.R.R., 29 F.3d 499 (9th Cir. 1994) and Ambrosini v. Labarraque, 101 F.3d 129 (D.C. Cir. 1996)).

Id. (quoting Sheehan v. Dailey Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997)).

Id. (citing Kumho Tire, 526 U.S. at 151).

Kumho Tire, 526 U.S. at 152.

See Ala. R. Evid. 702(b)(3).

Daubert, 509 U.S. at 596.

See Ala. R. Evid. 702, Advisory Committee Notes to 2012 Amendment; see also, ALA. CODE § 36-18-30.

Turner, 746 So 2d at 358-63.

Id. at 361.


Kumho Tire, 526 U.S. at 147.

Id.

Id.

Kumho Tire, 526 U.S. at 148.


See e.g., Courtaulds Fibers, Inc., v. Long, 779 So. 2d 198 (Ala. 2000) (holding that veterinarian’s opinion as to cause of death of horses was not scientific evidence subject to the admissibility requirements of Frye); Barber v. State, 952 So. 2d 393, 416 (Ala. Crim. App. 2005) (“The Frye test, however, applies only to the admissibility of novel scientific evidence based on scientific tests or experiments.”).

As correctly noted in Goodwin’s Overview, supra note 6, “[b]ecause the Frye test was rarely applied in civil cases, most of the case law defining what is -- or is not -- “scientific” for the purposes of applying the Frye standard, developed in criminal cases.”

C. Gamble & R. Goodwin, McElroy’s Alabama Evidence, § 490.01(1)(b) (6th ed. 2009).

See Barber v. State, 952 So. 2d 393, 415-16 (Ala. Crim. App. 2005) (listing several cases where the Frye standard was not applicable and was instead governed only by the prior Ala. R. Evid. 702, which is now located at Ala. R. Evid. 702(a)).

See e.g., C. Gamble & R. Goodwin, McElroy’s Alabama Evidence, § 490.01(2)(c) (6th ed. 2009); see also, Barber, 952 So. 2d at 419 (“[B]ecause print identification involves subjective observations and comparisons based on the expert’s training, skill, or experience, we conclude that it does not constitute scientific evidence and that, therefore Frye does not apply.)


Id.


Id.

Id.

Id.

Courtaulds, 779 So. 2d at 198.

Id. at 202.

For clarification purposes, it should be noted that the prior Alabama Rule of Evidence 702 has only been moved to Alabama Rule of Evidence 702(a).

Courtaulds, 779 So. 2d at 202.


Id. (internal quotations and citations omitted) (emphasis added).

General Motors Corp. v. Jernigan, 883 So. 2d 646 (Ala. 2003).

Id. at 661-62.

Id. at 662.

Id.