



THE GATEKEEPER'S DISCRETION: *Daubert* is All About the Judge

By: Dustin B. Herman, Spangenberg Shibley & Liber

Between 2008 and 2013 the Eleventh Circuit reviewed 54 *Daubert* decisions. In only three (3) of those cases was the district court reversed.¹ That can be good or bad depending on how you look at it, but what it surely means is that you had better win at the trial court level. And since trial courts are given such wide latitude in making decisions to exclude or admit expert testimony, our focus must always be on the judge and getting the gatekeeper's discretion to work in our favor.

WHERE IT ALL STARTED: THE BENDECTIN LITIGATION

Between 1956 and 1983, over 33 million women took Bendectin as an anti-nausea medication during pregnancy.² In the late 1970's and throughout the 1980's, thousands of lawsuits were filed all over the country claiming that Bendectin caused birth defects (specifically limb deformities). Prominent attorneys like Melvin Belli, Jim Butler, Allen Eaton, and Barry Nace spearheaded the litigation. In June 1983, Barry Nace obtained a \$750,000.00 verdict for plaintiff, Mary Oxendine, whose mother had taken Bendectin while pregnant, and who was born with a shortened right forearm and only three fingers on her right hand. 13 days after the verdict, Merrell Dow Pharmaceuticals, Inc. took Bendectin off the market. Merrell cited an increase in insurance rates and maintained that the drug is perfectly safe.³

Despite the verdict, an issue that continued to loom over the entire litigation was – did Bendectin actually cause birth defects? And the central issue in each case was – did Bendectin cause *this* plaintiff's birth defects? At the time, no one knew the causal mechanism by which Bendectin (allegedly) caused birth defects, and no epidemiological study had ever concluded Bendectin caused birth defects. Courts across the country struggled with the issue of whether, and *on what basis*, an expert could testify that Bendectin, not only caused birth defects, but caused the birth defects experienced by a particular plaintiff.

The question was – and is – essentially epistemological. That is – how does the expert “know” what the expert claims to “know”? What basis does the expert have for saying it? And the important question for courts in determining whether an expert's opinion is

admissible is: What counts as a *sufficient* basis – as a legally adequate foundation – as “good grounds” – for an expert’s opinion?

The Four Daubert’s – All the Way Up and Back Down Again

In response to a motion for summary judgment in the *Daubert* case (this is now 1989), Barry Nace produced seven experts who testified that Bendectin *can* cause birth defects (in general) and one expert who testified that Bendectin caused the birth defects suffered by the two plaintiffs.⁴ To reach their conclusions, the experts (all of whom had testified in other Bendectin cases) relied on: (1) *in vivo* animal studies; (2) *in vitro* (test tube) studies; (3) chemical structure analyses; and (4) a recalculation of previous epidemiological studies.⁵ The experts weighed the available evidence and basically said – look, it’s true that we don’t know the biological mechanism involved, and it’s true that no published epidemiological studies have ever concluded there is a statistically significant relationship between Bendectin and birth defects, but we know that when we give Bendectin to pregnant rabbits, it causes limb deformities in the offspring; and we know that Bendectin has detrimental effects upon animal cells grown in test tubes; and we know that the molecular structure of Bendectin is very similar to that of other chemicals that are known to cause birth defects; and finally, if you take a closer look at the data from the published epidemiological studies, there really is a statistically significant relationship between mothers taking Bendectin while pregnant and their children being born with limb deformities.

The District Court acknowledged that, “there are two schools of thought governing expert testimony in these Bendectin cases.”⁶ The majority view (already supported by the First, Fifth, Sixth and D.C. Circuits) was that absent a scientific understanding of the causal mechanism, a “failure to present statistically significant epidemiological proof” was “fatal” to the case.⁷ (Read: When the biological mechanism is unknown - the *only* thing that counts as a sufficient basis – as good grounds – for an expert’s testimony on causation is epidemiological evidence.) The minority view on the other hand did not require epidemiological evidence to prove causation. It permitted experts to weigh all of the available evidence in reaching a conclusion, gave “deference to the expert’s opinion,” and viewed the “varying conclusions as involving a classic battle of the experts.”⁸

The trial court in *Daubert* sided with the majority view’s bright-line approach and held (without mentioning *Frye*) that, “epidemiological studies are the most reliable evidence of causation in this area” and that an “expert opinion which is not based on epidemiological evidence is not admissible to establish causation because it lacks the sufficient foundation necessary under FRE 703.” (yes 703, not 702).⁹

The Ninth Circuit affirmed and, applying *Frye*, held that plaintiffs’ recalculations of epidemiological studies were not performed using a “generally accepted scientific technique” because “they were unpublished, not subjected to the normal peer review process and generated solely for use in litigation.”¹⁰

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As we all know, the case reached the Supreme Court. What many people don't realize, however, is that the Court's *Daubert* decision was a victory for the *plaintiffs*. The Court vacated the Ninth Circuit's opinion, stating that *Frye*, "should not be applied in federal trials" because "a rigid 'general acceptance' requirement would be at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to opinion testimony.'"¹¹ Instead of adopting the bright-line "general acceptance" approach (as the majority of the circuit courts had), the Court assigned the trial judge the role of "gatekeeper" with "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."¹² In other words, the Court set a new, more flexible standard for what counts as a sufficient basis for expert testimony. The opinion actually gave the plaintiffs a second chance.

On remand, however, the Ninth Circuit put the case to bed for good. It's an incredibly sarcastic opinion, highly critical of the Court's new standard, and truly a good read all around:

As we read the Supreme Court's teaching in *Daubert*, therefore, though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by the scientific method."

The task before us is more daunting still when the dispute concerns matters at the very cutting edge of scientific research, where fact meets theory and certainty dissolves into probability. As the record in this case illustrates, scientists often have vigorous and sincere disagreements as to what research methodology is proper, what should be accepted as sufficient proof for the existence of a "fact," and whether information derived by a particular method can tell us anything useful about the subject under study.

Our responsibility, then, unless we badly misread the Supreme Court's opinion, is to resolve disputes among respected, well-credentialed scientists about matters squarely within their expertise, in areas where there is no scientific consensus as to what is and what is not "good science," and occasionally to reject such expert testimony because it was not "derived by the scientific method." Mindful of our position in the hierarchy of the federal judiciary, we take a deep breath and proceed with this heady task.¹³

The Ninth Circuit avoided remanding the case to the trial court and held that summary judgment was appropriate even under the Court's new *Daubert* standard. It placed heavy

weight on the fact that the expert's opinions were formed solely for litigation purposes. It simply did not trust the experts testifying in the case, stating: "It's as if there were a tacit understanding within the scientific community that what's going on here is not science at all, but litigation."¹⁴

The court did note that if given another chance, plaintiffs' experts might be able to show that their opinions on general causation (i.e., Bendectin *can* cause birth defects) were derived using the scientific method and therefore are reliable. Nevertheless, applying the second prong of *Daubert*, the court held the testimony would not be relevant to the task at hand because, even if general causation could be proved, the plaintiffs could not prove specific causation.¹⁵ The court reasoned that without evidence of a relative risk factor of 2.0 (a doubling of the risk), the experts could not testify that Bendectin *more likely than not* caused the birth defects suffered by the two plaintiffs.

Here, the Ninth Circuit may have smuggled in a rigorous general acceptance standard by not giving the experts an opportunity to testify to whether a differential diagnosis was performed. Indeed, the court acknowledged that in some cases a relative risk factor of less than 2.0 could be combined with other evidence to support specific causation under a "more likely than not" standard.

Regardless, the *Daubert* case was over and a new era of litigation had begun.

THE NEW STANDARD: QUALIFICATIONS, RELIABILITY, AND RELEVANCY

In 2014, in *Adams v. Lab. Corp. of America*, the Eleventh Circuit summarized the standard for admissibility of expert testimony: "We have distilled from *Daubert*, *Kumho*, and Rule 702 these three requirements: First, 'the expert must be qualified to testify competently regarding the matter he or she intends to address'; second, the expert's 'methodology ... must be reliable as determined by a *Daubert* inquiry'; and third, the expert's 'testimony must assist the trier of fact through the application of expertise to understand the evidence or determine a fact in issue.'¹⁶

I will not discuss qualifications here, but instead turn to the heart of *Daubert* – reliability.

Reliability Means "Evidentiary Reliability" – i.e., "Trustworthiness"

The "reliability" prong is the primary focus in a *Daubert* challenge. It is critical to remember that *Daubert* was a case about scientific knowledge as opposed to the other types of knowledge expressly listed in F.R.E. 702 ("technical, or other specialized knowledge"). The Court made clear: "Our discussion is limited to the scientific context because that is the nature of the expertise offered here."¹⁷ Since *Daubert* was a case involving *scientific* knowledge as to whether a drug caused birth defects, the Court held expert opinions needed to be derived from the scientific method:

[I]n order to qualify as ‘scientific knowledge,’ an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation – i.e., ‘good grounds,’ based on what is known. In short, the requirement that an expert’s testimony pertain to ‘scientific knowledge’ establishes a standard of evidentiary reliability.¹⁸

In footnote (9), the Court clarified what it meant by evidentiary reliability. It acknowledged that scientists usually distinguish between “‘validity’ (Does the principle support what it purports to show?) and ‘reliability’ (Does application of the principle produce consistent results?).”¹⁹ The Court specified that “our reference here is to *evidentiary* reliability – that is, trustworthiness.”²⁰

We are all familiar with the notion that evidence must be trustworthy before it can be admitted into evidence. That is exactly what makes hearsay inadmissible—because something someone said out of court is not reliable evidence. We don’t know if it’s true. It can’t be trusted. It can’t be *relied upon*. Indeed, in footnote 9 the Court goes on to compare its *Daubert* standard of evidentiary reliability to the theory behind exceptions to hearsay, stating “hearsay exceptions will be recognized only ‘under circumstances supposed to furnish guarantees of trustworthiness.’”²¹ At the end of footnote 9, the Court states: “In a case involving scientific evidence, *evidentiary reliability* will be based upon *scientific validity*.”²² The Court spends much of the rest of the opinion trying to set up a structure for evaluating scientific validity and discerning “good science” from “pseudoscience” (which is where the four factors come into play).

The take away is that the *trustworthiness* of an expert’s opinion is really what *Daubert* is all about. The expert forms an opinion, and the trial court (as gatekeeper) gets to say, in essence – yea, but *how* do you know that? – what basis do you have for saying that? – please explain your reasoning.²³ In other words, under *Daubert*, experts must show their work.

***Joiner* – Analytical Gaps and Abuse of Discretion**

In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), the district court had precluded two experts from testifying that exposure to a certain chemical, PCB, “promoted” the plaintiff’s lung cancer, where plaintiff smoked cigarettes and had a family history of lung cancer. The experts’ opinions were based on mice studies and four (according to the district court – readily distinguishable) epidemiological studies. The district court found the studies to be an insufficient basis for the experts’ conclusions on causation and granted summary judgment. The Eleventh Circuit overturned the decision, but the Supreme Court reversed and upheld the exclusion of the expert testimony.

In *Daubert*, the Court stressed, “[t]he focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.”²⁴ However, in *Joiner*, Justice Rehnquist, modified this requirement, stating:

[C]onclusions and methodology are not entirely distinct from one another. Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.²⁵

Joiner is an exceedingly important case because it not only gives trial courts the discretion to evaluate the conclusions generated by an expert, but it also holds that a trial court's decision to admit or exclude expert testimony will not be overturned unless the court abuses its discretion.²⁶ This means that in most cases, whether the trial court decides to admit an expert's testimony or decides to exclude it, both decisions would be right (i.e., upheld).

***Kumho* – Technical Experts, Experience, and Intellectual Rigor**

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the Court affirmed the district court's exclusion of a tire expert's opinion that the tire blow-out was caused by a defect in the tire rather than due to abuse or the tire being underinflated. The exclusion was based, in part, on the fact that the expert was unable to explain the method he used and repeatedly relied, "on the 'subjectiveness' of his mode of analysis," in response to questions seeking specific information about his method for determining the defect.²⁷ Additionally, and this was a big red flag, the expert determined the tire to be defective – and issued a report to that effect – after simply looking at photographs of the tire and only inspected the tire itself the morning of his deposition.²⁸

The Court held that the trial court's gatekeeping function applies to all kinds of specialized knowledge, not merely scientific knowledge. The trial court must "make certain that [the] 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."²⁹

Factors Bearing on the Inquiry

Daubert listed four factors that will "bear on the inquiry" of reliability, but these were "general observations" and the Court stated it did "not presume to set out a definitive checklist or test."³⁰ In *Kumho*, the Court explained this point further:

[T]he factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. The conclusion, in our view, is that we can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in *Daubert*, nor can we now do so for subsets of cases categorized by category of expert or by

kind of evidence. Too much depends upon the particular circumstances of the particular case at issue.³¹

The Court went on to state, “no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.”³² But, “it will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.”³³ Even the Committee Notes to Rule 702 state: “[T]he text of *Rule 702* expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.”

Below is a non-exhaustive list of factors that will bear on the inquiry of reliability:

- Can be (has been) tested (*Daubert*)
- Peer reviewed (*Daubert*)
- Known or potential rate of error (*Daubert*)
- General acceptance (*Daubert*)
- Opinions formed for purposes of litigation³⁴
- An analytical gap between premises and conclusion³⁵
- Consideration of alternative explanations³⁶
- Same level of intellectual rigor employed in the courtroom as used in professional work³⁷
- Practical experience³⁸

Despite the clear teaching by *Kumho* and the Committee Notes, attorneys often make a big deal out of an expert's opinion lacking the factors listed in *Daubert*. But when conclusions are based upon a review of scientific literature, “it makes little sense to ask whether the technique employed ‘can be (and has been) tested,’ or what its ‘known or potential rate of error’ might be.”³⁹ Additionally, “reference to a published study . . . is not necessary to demonstrate minimum scientific reliability” where scientific literature “may not be extensive.”⁴⁰

Ultimately, as the Court stated in *Kumho*, “whether *Daubert's* specific factors are, or are not, reasonable measures of reliability in a particular case is a matter that the law grants the trial judge broad latitude to determine.” And further, as held by the Eleventh Circuit, the abuse-of-discretion standard, “applies as much to the trial court's decisions about how to determine reliability as to its ultimate conclusion.”⁴¹

Relevancy – A Question of Helpfulness or “Fit”

Expert testimony must be “sufficiently tied to the facts of the case,” – a consideration that has been described as “fit.”⁴² “‘Fit’ is not always obvious and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes.”⁴³

Some attorneys try to use this prong as a way to attack an expert’s conclusions. Most of the time, attacks on an expert’s conclusions should go to weight and not admissibility; the opposing attorney can bring out flaws in an expert’s conclusions on cross examination. “We have repeatedly stressed *Daubert’s* teaching that the gatekeeping function under Rule 702 ‘is not intended to supplant the adversary system or the role of the jury: vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking *shaky but admissible evidence*.’”⁴⁴

The example set out in *Daubert* regarding what the Court meant by “fit” is very helpful in diffusing this argument:

The study of the phases of the moon, for example, may provide valid scientific “knowledge” about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night. *Rule 702’s* ‘helpfulness’ standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.⁴⁵

DAUBERT IN PRACTICE

What makes *Daubert* such a game-changer, however, is not so much the standard to be applied to expert opinions, but that every expert opinion – in every case – is subject to scrutiny.

In the past, qualified experts in many states were permitted to give opinions based upon their experience and training. In 2007, the Florida Supreme Court (Florida being one of the last states clinging to *Frye*, until its legislature adopted the *Daubert* standard in 2013) recognized “[T]he *Frye* standard only applies when an expert attempts to render an opinion that is based upon new or novel scientific techniques. Therefore, we have recognized that *Frye* is inapplicable in the vast majority of cases.”⁴⁶

It is well-established that *Frye* is inapplicable to “pure opinion” testimony: [P]ure opinion testimony, such as an expert's opinion that a defendant is incompetent, does not have to meet *Frye*, because this type of testimony is based on the expert's personal experience and training. While cloaked with

the credibility of the expert, this testimony is analyzed by the jury as it analyzes any other personal opinion or factual testimony by a witness.

Because testimony causally linking trauma to fibromyalgia is based on the experts' experience and training, it is "pure opinion" admissible without having to satisfy *Frye*.⁴⁷

But now, as Florida's 3rd DCA recently stated, "the *Daubert* test applies not only to 'new or novel' scientific evidence, but to all other expert opinion testimony. Expert testimony that might otherwise qualify as 'pure opinion' testimony is expressly prohibited."⁴⁸

What this means practically is that virtually every expert opinion will be subjected to a *Daubert* analysis. We can expect challenges to our experts' opinions as sure as we can expect motions for summary judgment. We already know this to be the case in federal court, and the climate in state courts varies from state to state. But, to be sure, *Daubert* challenges are only going to increase in the future. And we, as the proponents of the expert opinions, have the burden of establishing (by a preponderance of the evidence) that the opinions are admissible.⁴⁹ Thus, from the outset of every case, we must be thinking about, and preparing for, the inevitable *Daubert* challenges to our experts.

10 Takeaways For *Daubert*

#1 – It's all about the Judge. This is far and away the most important thing that I have learned. Because the trial court has such powerful discretion, the judge must accept your case and your experts as legitimate. To make sure this happens, you should try to teach the judge the science of the case at every opportunity – in the complaint, in motions to compel, at hearings, in *Daubert* and summary judgment motions, etc. Most judges (like people in general) learn better when information is accompanied by pictures and illustrations. Use them every chance you get.

#2 – Choose Experts Wisely. Because *Daubert* is all about trustworthiness, your expert's qualifications become extremely important. A well-qualified expert, with relevant experience outside of litigation, will carry a lot of weight with most judges. You can rely heavily on this experience in defending *Daubert* motions.

#3 – Provide Materials To Experts Early and Often. Give your expert all materials, depositions, medical records, etc. as early as possible. It's a terrible feeling to be in a deposition and listening to the defense attorney run down a litany of medical records your expert did not review. (You can do the same to the defense expert.)

#4 – Create Visual Aids. Get your expert to create pictures/diagrams/illustrations/3D-models to help explain the expert's opinions. Expert opinions are much easier to understand when they are supported by visual aids; they will also seem more trustworthy.

#5 – Utilize Expert Reports. While there is no requirement in most states for your expert to create an expert report, you may want to have your expert do so anyway. It will help the judge understand the expert's opinions much better than a deposition transcript. Make sure the report includes a caveat about amending the opinions based upon new information being provided to the expert. The caveat should also ask the defendant to provide the expert with any materials the defendant would like your expert to consider. Then at deposition or at trial, when the defense attorney says, "but, you didn't you consider XYZ," your expert can at least say – "well, I did ask you to give me any information you wanted me to consider."

#6 – Stipulate to Confidentiality of Draft Reports. While drafts of expert reports are not discoverable in federal court, they are completely discoverable in most state courts. You may be able to stipulate with defense counsel at the beginning of a case that all communication and drafts regarding expert reports will not be discoverable. Confidentiality of draft reports is important because most experts do not know how to write a *Daubert*-proof report. They will need your help to do so, even if it's just providing an outline of what to include.

#7 – Depositions of Your Experts. You must take an active role at the deposition of your expert and walk your expert through the materials the expert reviewed and relied upon, the methodology the expert employed, and how the conclusions were derived from the methodology. Have the expert talk about how the method employed is similar to how the expert conducts work in his or her professional life.

#8 – Supplementing the Deposition. If your expert deposition does not go as smoothly as you would have hoped, you can supplement your expert's opinion with an affidavit from the expert. But, make sure that the affidavit only clarifies and does not contradict the deposition testimony. Or, after a *Daubert* motion is filed, you can request a *Daubert* hearing for your own expert, offering the judge the opportunity to speak directly to your expert.

#9 – Defending *Daubert* Motions. Again, the focus here should be on the judge and what the judge needs to understand. Use visual aids wherever possible; you can embed them right in the text. Make your motions short and concise. I usually start out all *Daubert* motions with a brief synopsis of why the overall case has merit. Attaching a new affidavit to your response to a *Daubert* motion can also be helpful, as long as the affidavit only helps refute the defendant's arguments in the *Daubert* motion and does not contain new opinions.

#10 – Motion to Admit Expert Testimony. You can file what in essence is a preemptive *Daubert* motion – a motion to admit the testimony of your expert. You have the burden of proof so you can make an affirmative showing to the court whenever you feel you ready to do so instead of waiting for the opposing party to file one at the last minute. This

also provides you with an opportunity to file a reply brief after the opposing party has responded to your motion. Also – the Third Edition of the Reference Manual on Scientific Evidence is an invaluable resource. Just Google it, download it, and use it.

10 Items To Be Included in Your Expert's Report

1. Summary/Roadmap of opinions.
2. Expert's Qualifications. Elaborate. Elaborate. Elaborate.
3. List of case specific materials provided to and reviewed by the expert so the judge knows the opinions are based upon "sufficient facts and data." Be specific and thorough. Also list any other materials/sources relied on or referenced by the expert.
4. Background information on the science involved in the case. Educate the judge.
5. Step by step narrative of the work and analyses the expert performed in the case. The judge should be able to see and follow the expert's thought process. Include pictures, graphs, charts, etc., wherever possible.
6. Discussion of consideration and rejection of alternative explanations.
7. Citations to (and discussion of) publications and authority that support the opinions.
8. Explanation of how the method used to reach the opinions in the case would have been acceptable in the field and that people in the field would have relied upon the opinions reached in this manner.
9. Concise statement of each and every opinion – and sub-opinions, if any – and use appropriate language as necessary depending on burden (e.g., "more likely than not").
10. Expert's CV, bills for the case, and history of testimony attached as exhibits to the report.

¹ *U.S. v. Alabama Power Co.*, 730 F.3d 1278, 1289 (11th Cir. 2013) (J. Hodge dissenting) ("That deference to the district court regarding *Daubert* evidentiary rulings is not idle dicta is established by research disclosing that, in the last five years, there have been 54 reported decisions of this court (13 published opinions and 41 unpublished opinions) reviewing district court evidentiary rulings under *Daubert*, and the district court was reversed in only three of those cases.").

² www.nytimes.com/1983/06/19/weekinreview/shadow-of-doubt-wipes-out-bendectin.html

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³ *Id.*

⁴ See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 727 F. Supp. 570 (S.D.CA. 1989).

⁵ *Id.*

⁶ *Daubert*, 727 F. Supp. at 572.

⁷ *Id.* (quoting *Brock v. Merrell Dow Pharmaceuticals*, 874 F.2d 307 (5th Cir.1989), modified, 884 F.2d 166 (5th Cir.1989), *reh'g denied, en banc*, 884 F.2d 167 (5th Cir.1989)); see also, *Richardson v. Richardson-Merrell*, 857 F.2d 823, 829 (D.C.Cir.1988); *Lynch v. Merrell-National Laboratories*, 830 F.2d 1190 (1st Cir.1987); *Hull v. Merrell Dow Pharmaceuticals, Inc.*, 700 F.Supp. 28 (S.D.Fla.1988); *In re Richardson-Merrell, Inc. "Bendectin" Products Liability Litigation*, 624 F.Supp. 1212 (S.D.Ohio 1985), *aff'd*, 857 F.2d 290 (6th Cir.1988); and *Thompson v. Merrell Dow Pharmaceuticals, Inc.*, 229 N.J.Super. 230, 551 A.2d 177 (1988).

⁸ *Id.* at 573 (citing *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100 (D.C.App.1986)).

⁹ *Daubert*, 727 F. Supp. at 575.

¹⁰ *Daubert v. Merrell Pharmaceuticals, Inc.*, 951 F.2d 1128, 1133 (9th Cir. 1991).

¹¹ *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579, 588 (1993) (citations omitted).

¹² *Daubert*, 509 U.S. at 597.

¹³ *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3 1311, 1316 (9th Cir. 1995).

¹⁴ *Id.* at 1318.

¹⁵ See *id.* at fn 16.

¹⁶ *Adams v. Lab. Corp. of America*, 760 F.3d 1322, 1328 (11th Cir., July 29, 2014) (quoting *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010)).

¹⁷ *Daubert*, at 590, n.8.

¹⁸ *Daubert*, 509 U.S. at 590.

¹⁹ *Daubert*, 509 U.S. at 590, n.9.

²⁰ *Id.* at n.9 (emphasis in original).

²¹ *Id.* at n.9 (quoting the Advisory Committee's Notes on Art. VIII of Rules of Evidence).

²² *Id.* at n.9 (emphasis in original).

²³ The purpose of a *Daubert* analysis is, "to analyze not what the experts say, but what basis they have for saying it." *Daubert*, 43 F.3 1311, 1318 (9th Cir. 1995).

²⁴ *Daubert*, 509 U.S. at 594-95.

²⁵ *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).

²⁶ *U.S. v. Brown*, 415 F.3d 1257, 1268 (11th Cir. 2005) ("[G]iven the heavy thumb—really a thumb and a finger or two—that is put on the district court's side of the scale, we conclude that it was not an abuse of discretion to admit the expert opinions . . .").

²⁷ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 155 (1999).

²⁸ *Id.*

²⁹ *Id.* at 152.

³⁰ *Daubert*, 509 U.S. at 593.

³¹ *Id.* at 150 (internal citations omitted).

³² *Id.* at 156.

³³ *Id.* at 151.

³⁴ See *Daubert*, 43 F.3 1311 (9th Cir. 1995).

³⁵ See *Joiner*, 522 U.S. at 146 (1997).

³⁶ See *Claar v. Burlington N.R.R.*, 29 F.3d 499 (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiff's condition). Compare *Ambrosini v. Labarraque*, 101 F.3d 129 (D.C. Cir. 1996) (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

³⁷ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999).

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³⁸ “Nothing in this amendment is intended to suggest that experience alone--or experience in conjunction with other knowledge, skill, training or education--may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.” Advisory Committee Notes on Fed. R. Evid. 702, 2000 Amendments (citing *United States v. Jones*, 107 F.3d 1147 (6th Cir. 1997) (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail)).

³⁹ See *Daubert*, 43 F.3d at 1317 n.4 (9th Cir. 1995).

⁴⁰ *United Fire & Cas. Co. v. Whirlpool Corp.*, 704 F.3d 1338, 1342 (11th Cir. 2013) (citing *Daubert*, 509 U.S. at 593).

⁴¹ *Id.* at 152-53.

⁴² *Daubert*, 509 U.S. at 591.

⁴³ *Id.*

⁴⁴ “We have repeatedly stressed *Daubert's* teaching that the gatekeeping function under Rule 702 ‘is not intended to supplant the adversary system or the role of the jury: vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking *shaky but admissible evidence.*’” *Adams v. Lab. Corp. of America*, 760 F.3d 1322, 1334 (11th Cir., July 29, 2014) (emphasis in original) (quoting *United States v. Alabama Power Co.*, 730 F.3d 1278, 1282 (11th Cir. 2013)).

⁴⁵ *Daubert*, 509 U.S. at 591.

⁴⁶ *Marsh v. Valyou*, 977 So.2d 543, 547 (Fla. 2008).

⁴⁷ *Marsh*, 977 So.2d at 548-49 (internal citations omitted).

⁴⁸ *Perez v. Bell South Telecom. Inc.*, 138 So.3d 497 (Fla. 3d DCA April 23, 2014).

⁴⁹ “Thus, the proponent of the testimony does not have the burden of proving that it is scientifically correct, but that by a preponderance of the evidence, it is reliable.” *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1312 (11th Cir. 1999) (citing *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 744 (3rd Cir. 1994)).