FROM *FRYE* TO *DAUBERT*

Alabama's standard with respect to the admissibility of expert testimony will soon evolve. Currently, expert testimony admissibility is governed by the *Frye* [1] standard. Prior to this latest tort reform package, the Alabama Supreme Court consistently rejected the adoption of the *Daubert* [2] standard for the admissibility of scientific evidence.[3] Part of the June 9, 2011, comprehensive tort reform package dealing with expert testimony admissibility would have changed Alabama from the Frye standard to a hybrid *Daubert* standard. The new statute is found at Alabama Code § 12-21-160. However, before the statute could take effect, the Alabama Supreme Court amended Rule 702 of the Alabama Rules of Evidence to be consistent with the legislative amendment.

Amended Rule 702, Testimony by Experts, will read as follows:

> (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) In 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 date;
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> (2) The testimony is the product of reliable principles and methods; and
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> (3) The witness has applied the principles and methods reliably to the facts of the case.
>
> The provisions of this section (b) shall apply to all civil state-court actions commenced on or after January 1, 2012. In criminal actions, this section shall apply only to nonjuvenile felony proceedings in which the defendant was arrested on the charge or charges that are the subject of the proceedings on or after January 1, 2012. The provisions of this section (b) shall not apply to domestic-relations cases, child-support cases, juvenile cases, or cases in the probate court. Even, however, in the cases and proceedings in which this section (b) does not apply, expert testimony relating to DNA analysis shall continue to be admissible under Ala. Code 1975, § 36-18-30.
>
> (c) Nothing in this rule is intended to modify, supersede, or amend any provisions of the Alabama Medical Liability Act of 1987 or the Alabama Medical Liability Act of 1996 or any judicial interpretation of those acts.

Attorneys preparing cases supported by expert testimony must ensure that a retained expert's work product meets this new standard. For civil cases (except medical malpractice cases) filed after January 1, 2012,[4] a hybrid version of the *Daubert* standard will apply in the Courts of Alabama. Alabama's new expert admissibility standard is not identical to the federal *Daubert* standard. Alabama's version will only apply to "scientific" expert testimony.[5] The

evidentiary criteria will apply to non-juvenile felony proceedings; however, it will not apply to domestic relations, child support, juvenile, probate cases or DNA analysis.[6]

One might question whether the Legislature's statute or the Alabama Supreme Court's amended Rule 702 controls. Amended Rule 702 controls because it was enacted after the statute.[7] Under *Schoenvogel*, if a statute and a rule of evidence conflict on a matter of procedure, the most recently enacted of the two will control.[8] An understanding of where we've been under *Frye*, the evolution of the *Daubert* test in the federal system, and language of amended Rule 702 will assist in determining how we should retain experts and prepare them for challenges.

Frye* v. *Daubert

In cases where novel scientific principles are at issue, Alabama courts have applied the *Frye* standard to expert witness testimony since at least 1953.[9] The *Frye* test required evidence based upon a novel scientific principle to be "generally accepted" within its scientific field to be admissible in court.[10] In *Frye*, the D.C. Court of Appeals refused to admit evidence based upon the result of a lie detector test because the test had not "gained such standing and scientific recognition among physiological and psychological authorities" to constitute "general acceptance" within the field.[11] Federal Courts used the *Frye* test in determining expert testimony admissibility until *Daubert* was decided.

Daubert abandoned the exclusive use of the *Frye* test in Federal Courts.[12] Instead, the United States Supreme Court created a new test which required trial courts to determine whether the methods underlying the scientific expert testimony were reliable.[13] To determine reliability, the Court listed several factors for trial courts to consider:

(1) whether the theory or technique can be or has been tested;
(2) whether the theory or technique has been exposed to peer review and publication;
(3) the known or potential error rate associated with a particular technique;
(4) whether there were standards that controlled a particular technique's operation; and
(5) Frye's general acceptance test." [14]

Following the *Daubert* decision, the U.S. Supreme Court clarified two things for trial judges in *General Electric Co. v. Joiner:* [15] (1) abuse of discretion is the standard of review for application of *Daubert* [16] and (2) trial judges can apply *Daubert* to an expert's conclusions as well as the expert's methods.[17] An "abuse of discretion" standard of review gave trial judges considerable power in determining the admissibility of expert testimony. Likewise, expanding the *Daubert* analysis to experts' conclusions as well as their methods expanded the trial judges' role in affecting the outcome of cases where expert testimony is necessary. *Daubert* was further expanded in *Kumho Tire Co. v. Carmichael*,[18] when the Court held that *Daubert* was not limited to scientific experts.[19] The *Kumho* holding allowed trial judges to apply *Daubert* to the admissibility of all Rule 702 experts.[20] These three cases, *Daubert*, *Joiner* and *Kumho* have been dubbed the "*Daubert* trilogy".

Alabama's Hybrid *Daubert* Rule

Amended Rule 702 only adopts the holding of *Daubert*. The new evidentiary rule explicitly and intentionally applies solely to "scientific evidence," i.e. "expert testimony based on a scientific theory, principle, methodology, or procedure." The adoption of this language was an intended rejection of *Kumho*, which held that the *Daubert* standard applied to all experts, not just scientific ones. This means that Alabama trial judges will apply the *Daubert* factors to an expert's methodology but will not apply *Daubert* to non-scientific experts. Non-scientific experts' testimony will be admissible if it meets the old Alabama Rules of Evidence 702 or 702(a) of the amended rule:

> "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."

The amended rule does not speak directly to whether the key holding of *Joiner* is being adopted. Thus, the Alabama Supreme Court will have to weigh in to determine whether Alabama trial judges may analyze and reject an expert's ultimate conclusions, instead of limiting the *Daubert* review to only the expert's methodology.

In addition to determining whether or not to adopt *Joiner*, the Alabama Supreme Court will likely decide, in the very near future, how trial judges will interpret "scientific evidence." Will courts interpret "scientific evidence" differently under the hybrid *Daubert* test than they did under *Frye*? Senator Ben Brooks, the sponsor of the Alabama *Daubert* legislation, stated at the Alabama State Bar meeting that the intent of the language in the legislative bill was to allow case law to develop to define the term, relying on the considerable body of case law developed under the *Frye* standard. Will Alabama appellate courts follow Senator Brooks' intent? We will soon found out. We do know, however, that this hybrid *Daubert* rule will be triggered with all "scientific" evidence and will apply to the expert's methodology regardless of whether the scientific evidence is novel. Federal case law interpreting the *Daubert* ruling is potentially available as persuasive language. Although the definition of "scientific" will continue to develop under amended Rule 702, prior Alabama Appellate Court decisions have held that certain evidence is not scientific under the *Frye* test:

- In *Southern Energy Homes v. Washington*,[21] the Alabama Supreme Court held that the application of *Frye* was not warranted because the methodology used by [the expert] was acquired through on-the-job training;

- In *Ex parte Dolvin*,[22] the Alabama Supreme Court held a forensic odontology test was not a scientific test, but a physical comparison and thus admissible;

- In *Courtaulds Fibers, Inc. v. Long*,[23] the Alabama Supreme Court ruled that the testimony of a veterinary toxicologist, as an expert witness for property owners in a trespass action against a manufacturing plant, was not subject to *Frye* because the expert's opinion – that the plant's carbon disulfide emissions caused the death of the plaintiffs' horses – was derived from knowledge, skills, and

training he had received through years of experience, which was all that was required by Rule 702 [amended Rule 702(a)] **because the testimony was neither scientific** nor novel;

- In *Millry Mill Co. v. Manuel*,[24] the Alabama Court of Civil Appeals held that an ordinary medical diagnosis, based in part on the patient's self-reported history, is not "scientific," within the meaning of *Frye;*

- In *Seewar v. Town of Summerdale*,[25] the Alabama Court of Criminal Appeals held that field sobriety tests such as the one-leg stand test and the walk and turn test are not scientific tests for purposes of *Frye*; and

- In *Barber v. State* [26] and *Culver v. State*,[27] the Alabama Court of Criminal Appeals held that fingerprint matching and identification involves subjective observations and comparisons based on the expert's training, skill, or experience, and does not constitute scientific evidence within the meaning of *Frye.*

An Alabama attorney could very well have an expert retained in a state and federal action simultaneously. That expert could be subject to admissibility standards in state and federal courts that are identical, similar or entirely different. At the end of the day, we want predictability and fairness so we can adequately represent our clients. We want to caution attorneys representing plaintiffs to be aware of misinformation already in circulation and any additional misinformation we expect to come in the near future. We can report to you that in at least one pending case that we know of, counsel representing the Defendant asked the trial judge to approve a Scheduling Order that included dates to conduct *Daubert* hearings despite the fact that amended Rule 702 only applies to cases filed on or after January 1, 2012. Likewise, we expect the Defense bar to argue that amended Rule 702 applies to "all" experts. Clearly, amended Rule 702(a) applies to non-scientific testimony and amended 702(b) applies to scientific testimony. The Alabama Supreme Court adopted the Advisory Committee's notes for amended Rule 702. The Advisory Committee's notes evidence an intent to differentiate between scientific and non-scientific evidence:

> To promote uniformity and avoid confusion, Rule 702 has been amended to adopt the admissibility standard for scientific evidence set forth in Section 1 of Act No. 2011-629, amending § 12-21-160. To promote clarity, this amendment divides Rule 702 into subsections. The text of Rule 702, as it read before this amendment, has been placed unchanged in section (a), and the new admissibility standard for **scientific evidence** is set forth in section (b).[28]
>
> The amendment requires the trial judge to act as "gatekeepers" and determine whether the **scientific** evidence is both "relevant and reliable." *See Daubert*, 509 U.S. at 597.[29]

We encourage our membership to be vigilant when dealing with *Daubert* challenges under amended Rule 702. We want to ensure that the new *Daubert* standard relating to scientific evidence is applied as intended. To that end, we encourage communication and cooperation throughout 2012. AAJ and its members should coordinate efforts dealing with

Daubert challenges to ensure consistency and fairness. If we work together to ensure consistency and proper application of amended Rule 702, representing our clients using scientific testimony will proceed smoothly in 2012 and beyond.

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[1] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).
[2] *Daubert v. Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
[3] See *General Motors Corp. v. Jernigan*, 883 So.2d 646, 661 (Ala. 2003); *Slay v. Keller Industries*, Inc. 823 So.2d 623, 625 (Ala. 2001); and *Courtaulds Fibers, Inc. v. Long*, 779 So.2d 198 (2000).
[4] Ala. S. Ct. Order, November 29, 2011.
[5] Ala. R. Evid. 702 (effective January 1, 2012).
[6] Ala. S. Ct. Order, November 29, 2011, Appendix C.
[7] *See M.L.H. v. State*, No. CR-09-0649, ___So.3d___, 2011 Ala. Crim. App. LEXIS 46 (Ala. Crim. App. July 8, 2011); citing *Schoenvogel v. Venator Group Retail, Inc*. 895 So.2d 225 (Ala. 2004).
[8] *Id*. at *41.
[9] Robert J. Goodwin, Fifty Years of Frye in Alabama: The Continuing Debate Over Adopting the Test Established in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 35 CUMB. L. REV. 231 (2004). *See General Motors Corp. v. Jernigan*, 883 So.2d 646, 661. (ALA. 2003); *Bagley v. Mazda Motor Corp.*, 864 So.2d 301 (ALA 2003); *Courtaulds Fibers, Inc. v. Long,* 779 So.2d 198 (2000); *Southern Energy Homes, Inc. v. Washington*, 774 So.2d 505 (2000).
[10] *Frye*, 293 F. 1013 (D.C.Cir.1923).
[11] *Id*.
[12] *Daubert*, 509 U.S. at 589.
[13] *Id*.
[14] *Goodwin*, *supra*. Note 1, at 270.
[15] 522 U.S. 136 (1997).
[16] *Id.* at 142.
[17] *Id*. at 146-147.
[18] 526 U.S. 137 (1999).
[19] *Id.* at 149.
[20] *Id.*
[21] 774 So.2d 505 (Ala. 2000).
[22] 391 So.2d 677 (Ala. 1980).
[23] 779 So.2d 198 (Ala. 2000).
[24] 999 So.2d 508, 517 (Ala. Civ. App. 2007), *cert. denied* (Ala. 2008).
[25] 601 So.2d 198 (Ala. Crim. App. 1993).
[26] 952 So.2d 393, 417 (Ala. Crim. App. 2005).
[27] 22 So.3d 499 (Ala. Crim. App. 2008).
[28] Ala. S. Ct. Order, November 29, 2011, Appendix B.
[29] *Id.*