Post-Daubert Confusion With Expert Testimony

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EXPERT TESTIMONY

I. INTRODUCTION

Federal courts have struggled with the admissibility of expert testimony for seventy years.\(^1\) Although the recent Supreme Court decision of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*\(^2\) resolved some of the uncertainty, it also created new problems with which the lower courts must struggle.\(^3\) Prior to *Daubert*, two theories of admissibility existed in the federal courts. Some of the lower courts followed the "general acceptance test,"\(^4\) while other courts followed the Federal Rules of Evidence,\(^5\) after their enactment in 1975. In attempting to resolve this split in the lower courts, the *Daubert* Court established a bifurcated analysis for the use of novel expert testimony.\(^6\) In the initial, pre-trial stage, the court determines: (1) if the methodology of the expert testimony is reliable in itself;\(^7\) and (2) if the expert testimony is even admissible.\(^8\) In the second stage, if the testimony is determined to be reliable and admissible, the trier of fact determines the credibility to be given to the expert testimony at trial.\(^9\)

It is not surprising that the first stage has become the central battleground in cases involving scientific evidence, because of the significance of expert testimony in these complicated disputes. In order for plaintiffs to even raise their

\(^1\) This time period begins with the decision in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and continues through the Supreme Court’s decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993) to the present.

\(^2\) 113 S. Ct. 2786 (1993).

\(^3\) This comment addresses the problems experienced by the lower courts in the wake of *Daubert*. See infra part V.

\(^4\) See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).

\(^5\) Although there were many courts that followed the Federal Rules, the Third Circuit seemed to be the leading proponent in their decision in United States v. Downing, 753 F.2d 1224 (3d Cir. 1985). For an in-depth analysis, see infra part II.B.

\(^6\) *Daubert*, 113 S. Ct. at 2795-97.

\(^7\) Id. at 2794-95.

\(^8\) Id. at 2795-96.

\(^9\) Id.
cause of action at trial, they must be able to survive the sum-
mary judgment motions that have become defendants' favor-
ite and most frequently used pre-trial motion.\textsuperscript{10} The basis of
these motions is supported and opposed by expert affidavits
before the court.\textsuperscript{11} It is on this point that the Supreme Court,
in \textit{Daubert}, created a new problem of ambiguity.

This comment discusses the conflict between the liberal
Federal Rules of Evidence prescribed by \textit{Daubert},\textsuperscript{12} and the
factually specific requirements of the Federal Rules of Civil
Procedure.\textsuperscript{13} The analysis will focus on the problems associ-
ated with the use of expert testimony within summary judg-
ment motions in cases that involve novel scientific evidence,
relying on novel scientific testimony, that have bombarded
the federal courts today.\textsuperscript{14}

Part II of the comment will discuss the historical signifi-
cance of the holding in \textit{Frye v. United States}\textsuperscript{15} and the propo-
nents of this decision.\textsuperscript{16} It will also discuss the pre-\textit{Daubert}
cases that rejected the general acceptance test and followed
the Federal Rules of Evidence,\textsuperscript{17} the Supreme Court's posi-
tion on Federal Rule of Civil Procedure 56 summary judg-
ment motions,\textsuperscript{18} and the holding of \textit{Daubert v. Merrell Dow
Pharmaceuticals, Inc.}\textsuperscript{19} Furthermore, part II explains how
lower courts have attempted to interpret \textit{Daubert}.\textsuperscript{20}

Part III will identify the specific problems created in the
\textit{Daubert} decision.\textsuperscript{21} Part IV will analyze how the various the-

\begin{itemize}
\item \textsuperscript{10} See, e.g., Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Lib-
     Cir. 1986).
\item \textsuperscript{11} See, e.g., cases cited supra note 10.
\item \textsuperscript{12} Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2794
     (1993).
\item \textsuperscript{13} See infra part II.
\item \textsuperscript{14} See infra part IV.
\item \textsuperscript{15} See Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
\item \textsuperscript{16} See infra part II.A.
\item \textsuperscript{17} See infra part II.B; see also United States v. Downing, 753 F.2d 1224 (3d
     Cir. 1985).
\item \textsuperscript{18} See infra note 61 and accompanying text.
\item \textsuperscript{19} See infra part II.D; see also Daubert v. Merrell Dow Pharmaceuticals,
\item \textsuperscript{20} See infra part II.E; see also Daubert v. Merrell Dow Pharmaceuticals,
     Inc. (II), 48 F.3d 1311 (9th Cir. 1995); United States v. Davis, 40 F.3d 1069
     (10th Cir. 1994); Hopkins v. Dow Corning Corp., 33 F.3d 1116 (9th Cir. 1994);
     United States v. Martinez, 3 F.3d 1191 (8th Cir. 1993).
\item \textsuperscript{21} See infra part III.
\end{itemize}
ories merged into the holding of Daubert and how this affects expert testimony within the Federal Rules of Evidence and the Federal Rules of Civil Procedure in pre-trial summary judgment motions. Part V proposes how the courts can resolve the confusion in Daubert with respect to the Federal Rules of Evidence and the Federal Rules of Civil Procedure. The key to this proposal is to combine the principles from Daubert, the Federal Rules of Evidence, and summary judgment requirements through Federal Rule of Evidence 706 (court-appointed experts). Rule 706 has the potential to become one of the most significant rules of evidence in the wake of Daubert because of the increasing number of federal cases that involve novel scientific evidence. Using court-appointed experts can not only relieve the ambiguity between the rules of evidence and the summary judgment motion, but can also assist district judges in reaching educated decisions.

II. BACKGROUND

A. The Old Frye Test

1. The Frye Decision

The modern struggle with novel expert testimony in the federal courts began in 1923 with the now infamous decision of Frye v. United States. The court held that the appropriate test for expert testimony was whether the testimony was "sufficiently established to have gained general acceptance in

22. See infra part IV.
23. See infra part V.
24. 293 F. 1013 (D.C. Cir. 1923). The petitioner in this case had been charged with and found guilty of second degree murder. Id. In his defense, Mr. Frye attempted to admit into evidence expert testimony concerning a systolic blood pressure deception test, which is an early version of the modern polygraph test. Id. The expert testimony was to be admitted in an effort to show that Mr. Frye had passed this test and to corroborate his claim of innocence. Id. The trial court refused to admit the expert testimony, and the appellate court affirmed on the grounds that this test did not meet generally accepted scientific recognition. Id. The appellate court developed the requirements that became known as the Frye test. Id. at 1014. Perhaps foreshadowing the ultimate success of this test, the petitioner in this case was apparently telling the truth regarding his innocence. After Frye had been convicted and sentenced to life, the real murderer confessed to the crime. See State v. Valdez, 371 P.2d 894, 896 n.4 (Ariz. 1962) (citing William Wicker, The Polygraph Truth Test and the Law of Evidence, 22 Tenn. L. Rev. 711, 715 (1953)). It is somewhat astounding that the two-page opinion in Frye could be the cause of such confusion and turmoil in the federal courts, and yet be cited as an authority in hundreds of cases over the past seventy years.
the particular field in which it belongs." In the area of novel scientific evidence, this results in a "special foundational requirement" to be determined by the court. Many critics of Frye based their concerns on the lack of structure in the determination of what should constitute scientifically valid expert testimony.

When dealing with novel expert testimony, as is often the situation in cases involving novel scientific evidence, courts that adopted the Frye test were forced to make a preliminary determination based upon expert testimony and other evidence to determine: (1) the status, in the appropriate scientific community, of the scientific principle underlying the proffered novel evidence; (2) the technique of applying the scientific principle; and (3) the application of the technique on the particular occasion relevant to the proffered expert testimony.

The proponents of the Frye test have continually argued for its acceptance on several theories. One premise is that the general acceptance test keeps the determination of whether a scientific theory is valid within the scientific community, and thus shifts this burden of analysis away from the judge and jury. This theory allows the scientists, as the most qualified, to assess the validity of expert testimony.

25. Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). The actual language of the court of appeals was:

Just where a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.

Id.


27. Id.

28. See United States v. Tranowski, 659 F.2d 750, 754-57 (7th Cir. 1981) (applying the Frye test to testimony by an astronomer purporting to date a photograph by measuring the length of shadows on the photo). Although this test has been used by courts following the Frye analysis, it is by no means the exclusive test for determining the admissibility of novel expert testimony. Id. at 754-57. It is merely one example of those that have been used. See also United States v. Brown, 557 F.2d 541, 557 (6th Cir. 1977) (applying the Frye test to ion microphobic analysis).


30. Id.
Other courts have held that the use of the general acceptance test has the direct effect of promoting judicial efficiency.\textsuperscript{31} Courts have also argued that the use of the general acceptance principle guarantees that experts will testify about the status of a particular scientific technique, and, at least in theory, create uniform decisions throughout the federal courts.\textsuperscript{32} Finally, proponents of Frye claim that the standard further safeguards against possible prejudicial effects caused by testimony of an unproved hypothesis in an unreproduced experiment.\textsuperscript{33}

2. The Frye Test and the Federal Rules of Evidence

The Frye test remained relatively unchanged, with limited exceptions, until the adoption of the Federal Rules of Evidence in 1975.\textsuperscript{34} After their adoption, many courts attempted to harmonize the Frye test with the Federal Rules of Evidence and met with varying degrees of success.\textsuperscript{35}

As a preliminary measure, it is necessary to discuss the individual Federal Rules of Evidence that are directly relevant to expert testimony. Rules 401 and 402 concern the admission of relevant evidence and the exclusion of irrelevant evidence.\textsuperscript{36} Rule 403 excludes relevant evidence on the

\textsuperscript{31} Reed v. State, 391 A.2d 364, 371-72 (Md. 1978) (rationalizing the adoption of the Frye test as a means of allowing the scientific community, rather than the courts, to make the determination on validity of the expert testimony).

\textsuperscript{32} Addison, 498 F.2d at 744; People v. Kelley, 549 P.2d 1240, 1244 (Cal. 1976). Although Kelley is a state court decision, it is based upon the Frye test and continues to be the test for expert testimony in the California courts. Kelley, 549 P.2d at 1244. California courts accepted the Frye standard because of its conservative nature in not allowing scientific testimony that has not been accepted in the scientific community. \textit{Id.}

\textsuperscript{33} United States v. Brown, 557 F.2d 541, 556 (6th Cir. 1977).

\textsuperscript{34} See infra notes 36-41 and accompanying text.


\textsuperscript{36} Federal Rule of Evidence 401 provides: "Relevant Evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." \textit{Fed. R. Evid.} 401.

Federal Rule of Evidence 402 provides: "All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible." \textit{Fed. R. Evid.} 402.
grounds of prejudice, confusion, or waste of time.37 Rule 702 provides the general rule permitting the testimony of expert witnesses as long as the testimony will assist the trier of fact in understanding the evidence.38 Rule 703 regulates the bases of opinion testimony that are admissible.39 Rule 704 allows the expert to address the ultimate issue to be determined by the trier of fact.40 Finally, Rule 705 allows the expert to testify prior to disclosing the underlying facts or data used in the expert analysis.41

Some courts attempted to keep the Frye test intact when administering the Federal Rules.42 The Seventh Circuit was probably the most staunch supporter of the Frye test. In United States v. Smith, the court recognized the authority of

37. Federal Rule of Evidence 403 provides: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

38. Federal Rule of Evidence 702 provides: "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." FED. R. EVID. 702.

39. Federal Rule of Evidence 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. FED. R. EVID. 703.

40. Federal Rule of Evidence 704 provides:

(a) Except as provided in subdivision (b), testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are matters for the trier of fact alone.

FED. R. EVID. 704.

41. Federal Rule of Evidence 705 provides: "The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination." FED. R. EVID. 705.

Federal Rule of Evidence 702, and then directly proceeded to apply the Frye test as an additional measuring factor.43

One of the most definitive, and most recent, assimilations of the Frye test and the Federal Rules of Evidence occurred in Christophersen v. Allied-Signal Corp.44 There, the Fifth Circuit combined the two to create a non-inclusive, three-factor test for proffered expert testimony.45 The first question concerns an expert's qualifications on the topic at issue, as dictated by Federal Rule of Evidence 702.46 Second, if the expert is qualified, the court must determine whether the relevant facts in the case are the same type as those relied upon by other experts in the field.47 The third factor is whether in reaching his or her conclusion, the expert relied upon a methodology that is generally accepted in the particular field in which it belongs.48 Assuming that the expert testimony has passed Rules 702, 703, and the Frye test, Federal Rule of Evidence 403 serves as a general screening mechanism to eliminate unfair prejudice that substantially outweighs the probative value of the expert testimony.49 Although these rules were not intended to be mechanically applied, the first three steps are understood as threshold requirements for expert testimony, before it will be deemed admissible.50

B. Pre-Daubert Cases that Rejected the Frye Test in Favor of the Federal Rules of Evidence

After the adoption of the Federal Rules of Evidence, many courts refused to follow the Frye test, arguing that it

43. United States v. Smith, 869 F.2d 348, 351 (7th Cir. 1989). The court noted that although the Frye test had been criticized by many courts, the standard still applied in the Seventh Circuit. Id.
45. Christophersen, 939 F.2d at 1110.
46. Id. For the exact terms and language of Federal Rule of Evidence 702, see supra note 38 and accompanying text.
47. Christophersen, 939 F.2d at 1110-11. For the exact language of Federal Rule of Evidence 703, see supra note 39 and accompanying text.
48. Christophersen, 939 F.2d at 1111 (citing Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923)).
49. Id. For the exact language of Federal Rule of Evidence 403, see supra note 37 and accompanying text.
50. Christophersen, 939 F.2d at 1110 (citing Gideon v. Johns-Manville Sales Corp., 761 F.2d 1129, 1135 (5th Cir. 1985)).
was superseded by the Federal Rules. 51 Although the Frye test was still the dominant test at the time the Federal Rules of Evidence were adopted, the general acceptance test is never mentioned in the applicable rules nor in the Advisory Committee’s notes. 52

The Third Circuit argued that the Frye test was inconsistent with the Federal Rules of Evidence, based upon the Federal Rules’ broad scope of relevance. 53 In United States v. Downing, the court found the liberal nature of Federal Rule of Evidence 402 directly in conflict with the structure of the general acceptance theory proscribed by the Frye test. 54 Accordingly, the Third Circuit decided to use Federal Rules of Evidence 401 and 402 together, to create the possibility of admitting the type of novel scientific evidence that Frye 55 had excluded. 56

The court based its analysis upon Article VII of the Federal Rules of Evidence, in which Rule 702 allows for expert testimony when it will “assist the trier of fact to understand the evidence or to determine a fact in issue.” 57 The Third Circuit developed its own threshold determination for the admissibility of novel expert testimony, consisting of the following factors:

(1) the soundness and reliability of the process or technique used in generating the evidence, (2) the possibility that admitting the evidence would overwhelm, confuse, or mislead the jury, and (3) the proffered connection between the scientific research or test result to be presented, and particular disputed factual issues in the case. 58

Other courts that have rejected the Frye test have instead held that the appropriate test for admissibility of novel expert testimony is whether a qualified expert is willing and able to testify in court. 59 Alternatively, in State v. Kersting, 60

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51. Although many courts did reject the Frye test in favor of the federal rules, the Third Circuit was at the forefront of this movement.
52. United States v. Downing, 753 F.2d 1224, 1234 (3d Cir. 1984).
53. Id.
54. Id.
56. Downing, 753 F.2d at 1235.
57. Id. (quoting FED. R. EVID. 702); see supra note 38 and accompanying text.
58. Downing, 753 F.2d at 1237.
60. 638 P.2d 1145 (Or. 1982).
the court held that scientific evidence which is not generally accepted may nevertheless be admitted if there is credible evidence on which the trial judge can rely in making the initial determination that the technique is reasonably reliable.\(^\text{61}\)


In addition to the initial question of whether novel expert testimony is admissible under the Federal Rules of Evidence, a court must consider whether the evidence that is found to be admissible is sufficient to withstand a pre-trial summary judgment motion.\(^\text{62}\) Federal Rule of Civil Procedure 56 establishes the standard for granting summary judgment in federal courts.\(^\text{63}\)

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61. Kersting, 638 P.2d at 1145.
(a) For Claimant. A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.
(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.
(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.
(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.
In 1986, the Supreme Court decided a trio of cases which further defined the standard for summary judgment. In *Celotex Corp. v. Catrett*, the Supreme Court held that summary judgment would be appropriate when a party "fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial." The Court further held that if a summary judgment motion was supported with testimony such as an expert affidavit, Federal Rule of Civil Procedure 56(e) required the nonmoving party to respond by producing a rebuttal affidavit or otherwise the motion would be granted.

The Court expanded on this rule in *Anderson v. Liberty Lobby, Inc.* There the Supreme Court required the nonmoving party in a summary judgment motion to present the court with actual evidence that would be admissible at trial in support of the essential element of the party’s claim. Mere factual allegations would not be enough under Federal Rule of Civil Procedure 56(c), because the standard for the presentation of evidence to establish a proper factual dispute is very narrow. The Supreme Court went on to hold that if the evidence presented is merely colorable, or is not significantly probative to the case, summary judgment would be appropriate.

In the final case, *Matsushita Electronic Industries Co. v. Zenith Radio Corp.*, the Court emphasized that the burden on the nonmoving party to make a sufficient showing in defending against a summary judgment motion would be the “same as” the burden that the party would be required to carry at trial. The Court created a two-part test that would protect a nonmoving party from summary adjudication:

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Id.

65. See *Celotex Corp.*, 477 U.S. at 322.
66. Id. at 322.
67. Id. at 324.
70. Id. at 247-48.
71. Id. at 249-50.
72. 475 U.S. 574 (1986).
the nonmovant must be able to establish causation in the claim, and (2) the nonmovant must be able to establish that the issue of fact is "genuine." 74 In conclusion, the Court also noted that the actual inferences to be drawn from the facts must be viewed in the light most favorable to the nonmoving party. 75

D. Daubert v. Merrell Dow Pharmaceuticals, Inc.

In the Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., the confusion in the circuit courts regarding the admission of expert testimony was finally addressed. 76 In Daubert, the lower courts refused to admit plaintiffs' expert testimony because it did not meet the standards set forth in the general acceptance test, and, as a result, summary judgment was granted and affirmed for the defendant. 77 The Supreme Court granted certiorari in order to resolve the split in the circuit courts surrounding admission of expert testimony and to provide some uniformity. 78

1. Facts of Daubert

In Daubert, the plaintiffs brought the action, as guardians ad litem, for birth defects that were allegedly caused to their children. 79 The plaintiffs alleged that the defects were sustained as a result of the mothers' ingestion of the defendant's product, Benedictine. 80 The district court granted the defendant's motion for summary judgment on the grounds that plaintiffs' experts were not testifying to subject matter that was generally accepted within the scientific community, and the court of appeal affirmed. 81

2. The Supreme Court's Holding in Daubert

Justice Blackmun spoke for the majority and held that the general acceptance test proscribed by Frye was directly at odds with the liberal nature of the Federal Rules of Evi-

74. Id. at 585-86.
75. Id. at 587-88.
77. Id. at 2792.
78. Id.
79. Id. at 2791.
80. Id. at 2792.
As such, the Court rejected the Frye test as the standard for admissibility of novel expert testimony. The Court determined that the admission of expert testimony was to be separated into three parts: reliability, admissibility, and credibility. The Court further held that reliability, the threshold determination for admissibility of novel expert testimony, comes directly from Federal Rule of Evidence 702, which requires that the testimony sought to be introduced will "assist the trier of fact to understand the evidence or to determine a fact in issue."

Next, the Court interpreted Rule 702 itself. The Court determined that the term "scientific" implies a grounding in the methods and procedures of science, and "knowledge" refers to more than a subjective belief or unsupported speculation. However, the Court also noted that it is not necessary for the scientific testimony to be known to a "certainty," rather, it must be supported by the appropriate validation, or "fit." Furthermore, the Court tied these requirements back to Federal Rule of Evidence 702 which establishes a standard of relevancy that "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."

In the majority opinion, Blackmun used Federal Rule of Evidence 104(a) to establish a test for trial judges to use in

82. Id. at 2794.
83. Id.
84. Id. at 2794-98. The first two elements are for the determination of the judge, and the third is for the trier of fact, except in summary judgment motions, where the judge will make a determination on all three. Id.
85. Id. at 2795 (quoting Fed. R. Evid. 702).
86. Daubert, 113 S. Ct. at 2795.
87. Id. The Court stated that Rule 702 "clearly contemplates some degree of regulation of the subjects and theories about which an expert may testify. . . . [T]he subject of an experts testimony must be 'scientific . . . knowledge.'" Id. The Court endorsed the approach suggested by many prominent commentators, but only to the extent that the focus of the judge's role is to determine the reliability of the expert evidence, as ensured by the scientific validity of its underlying principles. Id. at 2799. In the final paragraph of the majority's opinion, when describing the requirements of Federal Rule of Evidence 702, the Court again returned to a requirement of scientific validity of the underlying principles of the expert's testimony. Id.
88. Id. at 2796 (citing Fed. R. Evid. 702).
89. Fed. R. Evid. 104(a). Rule 104(a) provides:
(a) Questions of Admissibility Generally. Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its deter-
conducting a preliminary inquiry into the admissibility of expert testimony. The Court characterized this role as that of a "gatekeeper," where it is the trial judge's responsibility to determine, through the application of a strict scrutiny test, whether the expert is purporting to testify to scientific knowledge that will assist the trier of fact in making a determination. The Court presented a list, neither inclusive nor dispositive, to assist the trial judge in assessing the scientific validity of the reasoning and methodology in the proffered expert testimony: (1) whether a scientific theory can be tested; (2) whether a theory has been subjected to peer review and/or publication; (3) whether a particular theory has a known or potential rate of error; and (4) whether a theory has attained a degree of acceptance in the scientific community. In closing, the Court emphasized that because of the liberal nature of the Federal Rules, these factors were to be applied only to the methodology of the expert, and not to his or her final conclusion. As such, the conclusion of the expert was irrelevant in determining admissibility.

In responding to the concerns of those courts which preferred the approach established in Frye, the Court also noted in dicta that the abandonment of the general acceptance test would not create a "free-for-all" barrage of irrational methodologies. Furthermore, the Court noted that the "scintilla test" for summary judgment and directed verdicts would, together with Federal Rule of Evidence 403, act as another level of protection against unfounded scientific principles.

Chief Justice Rehnquist, joined by Justice Stevens, filed a separate opinion in which he concurred in part and dis-
The Chief Justice agreed that the Frye test was superseded by the Federal Rules of Evidence, but disagreed with the majority's decision to provide a list of relevant factors to guide lower court determinations of reliability and admissibility of expert testimony.  

E. Post-Daubert Confusion in the Lower Courts

One of the underlying goals of the Daubert decision was to provide uniformity among the circuit courts by establishing a structure for the admissibility of expert testimony. Unfortunately, that goal has not been realized, and at least four different interpretations of Daubert have subsequently arisen.

In United States v. Martinez, the Eighth Circuit interpreted the Daubert decision as raising the standard for applying novel scientific evidence to particular cases by adding certain requirements in addition to those of admissibility and reliability. The Eighth Circuit found that before admitting the evidence, Daubert required the court to inquire into the process by which a scientific conclusion was formed. In addition, the decision relied heavily upon the testing protocol used by the expert, and the court required it to be generally accepted as reliable in the scientific community.

In Hopkins v. Dow Corning Corp., the Ninth Circuit's first attempt at interpreting Daubert, the court followed the

96. Id. at 2797.
97. Id. at 2799-800.
98. See supra notes 76-78 and accompanying text.
99. See, e.g., Daubert v. Merrell Dow Pharmaceuticals, Inc. (II), 43 F.3d 1311 (9th Cir. 1995); Hopkins v. Dow Corning Corp., 33 F.3d 1116 (9th Cir. 1994); United States v. Reed, 40 F.3d 1069 (10th Cir. 1994); United States v. Martinez, 3 F.3d 1191 (8th Cir. 1993).
100. 3 F.3d 1191 (8th Cir. 1993). The defendant in this case was convicted of aggravated sexual abuse and the sexual abuse of a minor, and he was convicted based upon scientific DNA evidence. Id. at 1191. Martinez appealed his conviction, challenging the reliability of the expert testimony concerning the DNA evidence. Id.
101. Martinez, 3 F.3d at 1197-98. The approach adopted by the Eighth Circuit was directly at odds with both the Federal Rules of Evidence and other lower court interpretations of the Daubert decision.
102. Id.
103. Id. at 1198.
104. 33 F.3d 1116, 1116-17 (9th Cir. 1994). The plaintiff in this case brought a products liability claim for her defective breast implants. Id. The defendant challenged the reliability and admissibility of her expert testimony concerning the scientific evidence in contention. Id.
Supreme Court's standards. The Ninth Circuit rejected the Frye test for determining admissibility, as having been superseded by the more liberal Federal Rules of Evidence.\(^{105}\) In addition, the court followed the gatekeeper analysis for determining the reliability of the methodologies used by the experts in reaching their conclusions.\(^{106}\)

In Daubert v. Merrell Dow Pharmaceuticals, Inc. (II),\(^ {107}\) the Ninth Circuit began to waiver in its support of Daubert. Although the Ninth Circuit expressly adopted the position of the Supreme Court, at the same time, it complained bitterly about the nature of the test established.\(^ {108}\) The Ninth Circuit was concerned about the judge's lack of knowledge of scientific evidence, and the uncomfortable position\(^ {109}\) that judges were placed in when making summary judgment determinations based upon expert testimony that they did not fully understand.\(^ {110}\)

The Ninth Circuit continually restated the language of the Supreme Court, but in making its final determination, it followed the same rationale as that used in its original decision.\(^ {111}\) While acknowledging the expert testimony standard, the Ninth Circuit seemed to ignore the Supreme Court's indication that a plaintiff's expert testimony should be admitted as novel scientific evidence. In conducting the gatekeeper analysis, the Ninth Circuit went through an in-depth analysis to justify reaching the same conclusion as before, and it excluded plaintiff's expert evidence.\(^ {112}\)

\(^{105}\) Hopkins, 33 F.3d at 1124 (citing Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2793 (1993)).

\(^{106}\) Id. at 1124-25.

\(^{107}\) 43 F.3d 1311, 1315 (9th Cir. 1995).

\(^{108}\) Daubert (II), 43 F.3d at 1315.

\(^{109}\) The Ninth Circuit commented:

"Our responsibility, then . . . is to resolve disputes among respected, well credentialed scientists about matters well 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."

Id. at 1316.

\(^{110}\) Id.

\(^{111}\) Id. at 1315-20.

\(^{112}\) Id. at 1321.
In *Davis v. Reed*, the Tenth Circuit reiterated the Supreme Court's holding that the first prong of the test created in *Daubert* could be satisfied through a liberal interpretation of the general acceptance test created under *Frye*. In addition, the Tenth Circuit adopted a middle ground test for the second prong, methodology, between the strict standards of the Eighth Circuit, and the much more flexible standards of the Second Circuit.

### III. Identification of the Problem

Unfortunately, in *Daubert* the Supreme Court provided little assistance for the lower courts, which were desperately awaiting guidance regarding the admissibility of novel scientific evidence. Instead, the Supreme Court issued a decision full of confusing contradictions. For example, the *Daubert* decision did not resolve how to correlate the Federal Rules of Evidence with the Federal Rules of Civil Procedure. Nor did *Daubert* ameliorate the conflict between the *Frye* test and the Federal Rules of Evidence. In addition, *Daubert’s* ambiguity created new splits among the lower courts because of the potential for multiple interpretations of the decision. In short, the decision in *Daubert* is flawed, as it breeds confusion rather than clarity.

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113. 40 F.3d 1069, 1074 (10th Cir. 1994). Defendants in this case were convicted of offenses arising from attempted armed robbery, and they appealed on the basis of expert testimony concerning DNA evidence that tied them to the scene of the crime. *Id.* at 1071-73.

114. *See discussion supra* part II.A.

115. For further analysis of lower court cases that have interpreted the Supreme Court’s decision in *Daubert*, see Gruca v. Alpha Therapeutic Corp., 51 F.3d 638 (7th Cir. 1995); United States v. Dorsey, 45 F.3d 809 (4th Cir. 1995); Bradley v. Brown, 42 F.3d 434 (7th Cir. 1994); United States v. Davis, 40 F.3d 1069 (10th Cir. 1994); Pioneer Hi-Bred Int'l v. Holden Found. Seeds, 35 F.3d 1226 (9th Cir. 1994); *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717 (3d Cir. 1994); Glaser v. Thompson Medical Co., 32 F.3d 969 (6th Cir. 1994); Sorensen *ex rel. Dunbar v. Shaklee Corp.*, 31 F.3d 638 (8th Cir. 1994); Wheat v. Pfizer, Inc., 31 F.3d 340 (5th Cir. 1994); United States v. Rincon, 28 F.3d 921 (9th Cir. 1994); United States v. Bonds, 12 F.3d 540 (6th Cir. 1993); United States v. Bynum, 3 F.3d 769 (4th Cir. 1993).

116. *See supra* part II.D.

117. *See supra* part II.D.

118. *See supra* part II.D.

119. *See supra* part II.E.
IV. Analysis

A. The Confusion Created by Daubert

With the adoption of Federal Rules of Evidence 702, 703, and 705,120 the admissibility of expert testimony and expert declarations was liberalized by permitting experts to base their opinions on evidence not otherwise admissible at trial.121 The Daubert Court, however, did not follow the liberal structure developed in the Federal Rules of Evidence when it created its framework for the use of expert affidavits in summary judgment motions.122 Although Daubert held that the Frye test was superseded by the Federal Rules of Evidence, the Court subsequently altered what the Federal Rules said.123 The Court restricted Federal Rules of Evidence 702, 703, and 705, by requiring expert opinions to meet a threshold determination of admissibility and reliability under strict judicial scrutiny.124

The conflict between the liberal Federal Rules of Evidence and the narrow Federal Rules of Civil Procedure is illustrated by comparing the requirements for submission of expert affidavits in support of or in opposition to a summary judgment motion.125 Federal Rule of Evidence 705 allows an expert to state his or her opinion and reasoning without prior disclosure of the underlying facts or data.126 However, according to the Federal Rules of Civil Procedure, if an expert declaration by a nonmoving party is only based upon opinion without any factual basis, the summary judgment motion will succeed.127 Under Federal Rule of Civil Procedure 56(e), in order to defeat a summary judgment motion, specific facts must be set forth, and unless an expert includes a factual background in support of his or her opinion testimony, the affidavit will not be allowed to challenge (or support) a summary judgment motion.128 As such, the expert declaration could meet the requirements for admissibility under the Fed-

120. See supra notes 38, 39, 41 and accompanying text.
121. See supra note 39 and accompanying text.
122. See discussion supra part II.D.
124. Daubert, 113 S. Ct. at 2794-98.
125. See discussion supra parts II.B, II.C.
126. See supra note 41 and accompanying text.
127. See discussion supra part II.C.
eral Rules of Evidence, yet not be sufficient for admissibility under the Federal Rules of Civil Procedure. The Supreme Court’s failure to adequately explain these discrepancies is only one of the many problems with the *Daubert* decision.

In an unfortunate decision, the *Daubert* Court tried to meet the standards for both the Federal Rules of Evidence and the Federal Rules of Civil Procedure at the same time. Writing for the Court, Justice Blackmun spent the first half of his analysis emphasizing the importance of a liberal position in the Federal Rules of Evidence, because novel scientific evidence would otherwise never be admissible. The Court went on to completely change its stance in the second half or its opinion, by creating a test that only scientifically acceptable theories would be able to pass. The Court placed two contradictory principles in the same opinion, without any explanation to assist the lower courts in their interpretations.

B. *Components of the Daubert Decision*

In order to understand the adversarial relationship that exists between the *Daubert* decision and the standard for summary judgment, it is necessary to break down the *Daubert* decision further into its most fundamental components. The essential link in the conflict between *Daubert* and Federal Rule of Civil Procedure 56 is the gatekeeping responsibility that the Supreme Court gave to federal judges in making initial determinations about the admissibility and reliability of expert testimony.

1. *Judge as Gatekeeper*

The role of the judge as gatekeeper to the admission of expert testimony is based on the policy concerns. Expert testimony is only admissible if it is beyond the common knowledge of the jury. When the subject matter of a cause of action is beyond the understanding of the jury, the expert testimony becomes an extremely powerful tool that has the

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129. *See* discussion *supra* part II.D.
131. *Id.* at 2796.
132. *See* discussion part II.D.
133. *Daubert*, 113 S. Ct. at 2796.
134. *See* *supra* note 38 and accompanying text.
135. *See* *supra* note 38 and accompanying text.
potential to sway a decision one way or another. Given this plausible impact, the Supreme Court determined that the best way to regulate the admission of expert testimony was through a gatekeeper. The gatekeeper's responsibility consists of making a threshold determination as to the reliability and admissibility of the expert testimony through the Federal Rules of Evidence. Although the Supreme Court unsuccessfully attempted to offer some minimal assistance to trial judges by providing four nondeterminative factors to help in their decision, the basis of the threshold determination for trial judges was to be based upon Federal Rules of Evidence 702 and 401.

2. Federal Rule of Evidence 702: Scientific Knowledge

The Court began its analysis of Rule 702 by emphasizing that the inquiry was to be a "flexible one" when determining whether the expert is actually testifying to "scientific knowledge." The focus of the analysis must be on the principles and methodology that are to be used by the expert, and not upon the final conclusions that are reached. Although in theory this limiting aspect on the trial judge's power is important, it is highly unlikely that a decision can be made solely upon the methodology to be used by the expert. It is often almost impossible to distinguish between the methodology used and the conclusion reached when dealing with novel scientific technology, which is exactly what Daubert is supposed to protect. The only way to adequately analyze the methodology is to look at the conclusion and work backwards.

3. Federal Rule of Evidence 703: Scientific Validity of Methodology

Federal Rule of Evidence 703 authorizes courts to scrutinize only the "scientific validity" of the "principles and meth-

136. See supra note 38 and accompanying text.
137. Daubert, 113 S. Ct. at 2796.
138. Id. at 2795.
139. See Davis v. Reed, 40 F.3d 1069, 1074 (10th Cir. 1994).
140. See discussion supra part II.D.2.
141. See supra notes 36, 38, 84-88 and accompanying text.
143. Id. at 2796.
144. See discussion infra part IV.B.
odology" used by an expert. The importance placed upon principles and methodology by the *Daubert* Court is evident by its use in multiple places throughout the decision. However, this judicial function carries even more weight when determining whether to allow expert affidavits in summary judgment motions, because the admission or rejection of the affidavit will have a conclusive effect upon the case. If the expert affidavit is not admitted to support or challenge the validity of a summary judgment motion, the party attempting to admit the affidavit will almost certainly lose.

A significant problem with this theory is that the court is making a determination on issues of which it is usually extremely ignorant. As such, the court's only natural reaction is to base the methodology on comparison with other principles that are already accepted as reliable. This places novel scientific evidence in a handicapped position from which it will almost never recover. The four nondeterminative factors from *Daubert* only mask the truth that any decision from the courts must be based upon a comparison. In order to determine the reliability of a methodology as required by *Daubert*, the court looks at the testing, peer review or publication, and/or potential rate of error, but the final decision is always encompassed in whether the theory is generally accepted or generally rejected. However, that is not the lower courts' fault. It is simply the only basis from which a decision can be made.

145. *Daubert*, 113 S. Ct. at 2795.
146. Id.
147. See discussion infra part IV.B for an in-depth analysis of how the gatekeeper structure created by *Daubert* correlates with summary judgment motions.
149. See supra part II.E. The basis of this argument is that when analyzing a scientific theory that the court has no background to understand, there are limited processes in determining the reliability and viability of the theory. The only reasonable method is in comparing the questionable theory to those that already have been proven reliable in the scientific community. This raises the next logical question: What happens when you are dealing with a novel scientific theory that has no similarity to already established methods? From the *Daubert* decision, the only feasible solution is to reject the theory at the outset. This is obviously not a satisfactory alternative.
150. Novel scientific evidence is exactly what *Daubert* is supposed to protect.
151. See supra text accompanying note 92.
152. See supra note 149.
4. Relevancy of the Expert Testimony

Federal Rules of Evidence 401 and 402, which are relevancy components, work within Rule 702 by requiring the judge to determine whether an expert's testimony will assist the trier of fact in determining a fact in issue. The Court noted that as a fundamental premise, unless the expert testimony is reliable, it will not be able to assist the trier of fact. The relevancy condition requires that the court determine whether a "valid scientific connection" exists between the expert's testimony and an issue in the case. This factor in the gatekeeper function also creates uncertainty and conflict when working within the narrow structure of a summary judgment motion.

The problem arises from the relationship between the gatekeeper determination and Rule 401, and because the gatekeeper analysis is fatally flawed. Again, the Supreme Court has attempted to combine two contradictory positions without adequate explanation. Relevant evidence is an extremely low standard, defined as evidence which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." It is impossible to reconcile the extremely liberal nature of Rule 401 with the Supreme Court's position, which requires the courts to apply strict scrutiny when determining the admissibility of expert testimony.

Within the same decision, the Supreme Court emphatically rejected the Frye standard in favor of the more liberal structure of the Federal Rules of Evidence, and then created a threshold analysis in which the court is required to

154. Daubert, 113 S. Ct. at 2795.
155. Id.
156. See discussion infra part IV.B for an analysis of how the gatekeeper structure created by Daubert correlates with summary judgment motions. See also text accompanying note 147.
157. See supra notes 88-93 and accompanying text.
158. See supra note 36.
160. See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
161. See supra notes 36-41 and accompanying text.
strictly scrutinize the expert testimony for reliability, "fit," and any potential prejudice or confusion. The Daubert Court’s continued emphasis of the liberal standard for the Federal Rules of Evidence is directly at odds with the strict scrutiny requirement. The Court underscored its decision by suggesting that the liberal attitude of the Federal Rules of Evidence is necessary for the protection of novel scientific evidence that would not otherwise be admissible. However, as is obvious from the decisions of lower courts that have attempted to interpret Daubert, the effect upon novel scientific evidence has been almost the opposite.

Another determining aspect of the confusion created in the Daubert decision arises from the difficulty in generating a single interpretation of the decision. In fact, as lower courts have shown in their recent decisions, Daubert is capable of multiple interpretations. The reality of the Daubert decision is that district courts can manipulate Daubert to justify any conclusion that they wish to make. In those circuits that have rejected the general acceptance test, Daubert can be used as the slayer of Frye. And, as equally convincing, in those circuits that have decided not to fully abandon the Frye decision, there is ample room for the justification of decisions based upon methodologies that are or are not "generally accepted in the particular field in which [they] belong." No matter which position is followed by the lower courts, there is a detrimental effect upon summary judgment motions. In his opening statements in Daubert, Justice Blackmun noted the need for uniformity in the federal courts

162. See supra note 87.
163. Daubert, 113 S. Ct. at 2798.
164. Id. at 2794, 2796.
165. Id. at 2794. The Court went so far as to stress that "we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence." Id.
166. See discussion supra part II.E.
167. See discussion supra part II.E.
168. See discussion infra part IV.B.
169. See discussion supra part II.E.
170. See discussion supra part II.E.
171. Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1124 (9th Cir. 1994).
172. Daubert v. Merrell Dow Pharmaceuticals, Inc. (II), 43 F.3d 1311, 1316 (9th Cir. 1995).
173. See discussion infra part IV.B.
regarding the appropriate standard for expert testimony.\textsuperscript{174} However, because of the ambiguous and open-ended decision in \textit{Daubert}, this goal could not be farther away.\textsuperscript{175}

C. \textit{Daubert} v. \textit{Federal Rules of Evidence} 56

After the \textit{Daubert} decision, expert declarations in support of summary judgment motions must pass a two-step test.\textsuperscript{176} First, the opinion expressed by the expert must be admissible at trial under Federal Rule of Evidence 702, which determines the expert's qualifications, and Federal Rule of Evidence 703, which determines the factual basis of the opinion.\textsuperscript{177} Second, if the expert affidavit is offered in opposition to a motion, the declarant must meet the requirement of Federal Rule of Civil Procedure 56(e), which requires that the declaration set forth specific facts.\textsuperscript{178}

However, the \textit{Daubert} holding requires an additional analysis that must be applied when dealing with novel scientific evidence.\textsuperscript{179} To be admissible, expert affidavits must meet the reliability and relevancy gatekeeper analyses.\textsuperscript{180} As such, the already high standard for summary judgment motions was made more difficult. It is now harder to succeed on a summary judgment motion or to survive one when the issues supporting one's case concern novel scientific evidence.\textsuperscript{181} This analysis created by \textit{Daubert} has extra significance, in that determining the admissibility of the scientific evidence at the summary judgment stage will often have profound effects upon the outcome of the case.\textsuperscript{182}

Although the Supreme Court in \textit{Daubert} succeeded in creating more problems than solutions, it was not entirely to blame, because many internal conflicts already existed between the liberal Rules of Evidence and the narrow Rules of Procedure.\textsuperscript{183} \textit{Daubert}'s gatekeeper function may have actu-

\begin{thebibliography}{9}
\bibitem{175} See discussion supra part II.E.
\bibitem{176} See discussion supra part II.D.2.
\bibitem{177} Daubert, 113 S. Ct. at 2795.
\bibitem{178} See supra note 63.
\bibitem{179} See supra notes 84-93 and accompanying text.
\bibitem{180} Daubert, 113 S. Ct. at 2796.
\bibitem{181} See supra notes 84-93 and accompanying text.
\bibitem{182} See sources cited supra note 10 and accompanying text.
\bibitem{183} See supra notes 84-93 and accompanying text.
\end{thebibliography}
ally been an attempt to rectify the conflicting set of rules.\footnote{Daubert, 113 S. Ct. at 2796.} If in fact that was the case, the Court failed because it created too many contradictions and not enough explanations.\footnote{See supra notes 84-93 and accompanying text.} Within \textit{Daubert}, the Court tried to combine the extremely liberal Federal Rules of Evidence 401, 402, 702, 703, and 705,\footnote{See supra notes 84-93 and accompanying text.} with the concrete requirements of Federal Rule of Civil Procedure 56.\footnote{See supra notes 84-93 and accompanying text.}

In cases in which both the moving and opposing parties rely upon the same methodology, any Rule 702 dispute will be moot. However, in cases where one party relies upon generally accepted policies, and another relies upon novel scientific evidence, the \textit{Daubert} decision has caused more problems than solutions.\footnote{See \textit{discussion supra} part IV.E.}

Proponents of \textit{Daubert} suggest that this decision will have a streamlining effect upon summary judgment motions that contain expert affidavits, and to some extent they are correct.\footnote{See United States v. Martinez, 3 F.3d 1191 (8th Cir. 1993).} However, the reason the analysis will be streamlined is because the \textit{Daubert} decision allows the lower courts to eliminate any methodology that is not subjectively satisfactory to the court.\footnote{Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786, 2796 (1993).} Unless a methodology is generally accepted within the scientific community, a plaintiff will never be able to survive a summary judgment motion, since the court's only basis for finding factual support for the claim is to compare it to expert theories that already exist.\footnote{See \textit{discussion supra} parts II.C, II.D.}

In addition, expert affidavits based on opinions, pursuant to Federal Rule of Evidence 705, will not be sufficient to defeat a summary judgment motion, because Federal Rule of Civil Procedure 56 and \textit{Daubert} require a factual certainty based only upon evidence that is admissible at trial.\footnote{See \textit{discussion supra} parts I.0, II.D.} \textit{Daubert} undoubtedly failed to explain the contradictions between the liberal position propounded by the Federal Rules of Evidence, and the narrowly tailored Federal Rule of Civil
Procedure 56, even though the Daubert decision was decided upon a summary judgment motion.193

D. Problems in the Lower Courts After Daubert

The problems with the Daubert decision can be seen in the turmoil that the decision has created in the lower courts when they try to apply Daubert in summary judgment motions.194 The result is that the courts lose perspective on the liberal aspects of the Federal Rules of Evidence and revert back to Frye.195

Although the lower federal courts have ostensibly adopted the presumption that Frye has been overturned by the liberal Federal Rules of Evidence, their actions have been quite different.196 The reaction of the different circuits has varied, and at least four interpretations have arisen which eliminate any possibility of uniformity in the lower courts.197

The best example of the confusion created by Daubert comes from the Ninth Circuit. In Hopkins v. Dow Corning Corp., the Ninth Circuit paid tribute to the Supreme Court's decision by following it verbatim in its analysis.198 However, in the remanded Daubert II, the Ninth Circuit completely abandoned its previous decision.199 Although it did pay lip service to the Supreme Court by verbally reciting the standards that Daubert established, the Ninth Circuit went through an in-depth analysis to reach the same conclusion as the one justified under the general acceptance standard.200 This is a perfect example of how the lower courts will be able to manipulate their decisions however they see fit, and at the same time remain within the ambiguous standards of Daubert.

193. See supra text accompanying notes 184-93. As a final sign of making a bad decision worse, the Daubert Court quoted the wrong standard for when a nonmovant may survive a summary judgment motion. Daubert, 113 S. Ct. at 2798.

194. See discussion supra part II.E.

195. See supra notes 109-15 and accompanying text.

196. See supra notes 109-15 and accompanying text.

197. See supra notes 109-15 and accompanying text.

198. Hopkins v. Dow Corning Corp., 33 F.3d 1116, 1116-17 (9th Cir. 1994).

199. Daubert v. Merrell Dow Pharmaceuticals, Inc. (ID), 43 F.3d 1311, 1316 (9th Cir. 1995).

200. See supra notes 109-15 and accompanying text.
E. Frye Survives

Expert testimony must be "sufficiently established to have gained general acceptance in the particular field in which it belongs." This theory of admissibility was rejected in Daubert as being superseded by the Federal Rules of Evidence. However, as illustrated above, the Frye test is far from dead in the federal courts.

It is important to remember that the Supreme Court in Daubert continually emphasized the liberal standard of the Federal Rules of Evidence. The policy concerns surrounding the Daubert decision continually emphasized the need for liberal interpretations of the Federal Rules of Evidence, and yet when the court turned to summary judgment motions, all policy concerns were discarded in favor of much narrower interpretations of the rules.

Although the Frye test did have many problems and was finally rejected in Daubert, it is somewhat ironic that the general acceptance test seems to be more in line with what the courts look for when analyzing expert declarations in a summary judgment motion. The Supreme Court rejected the rigid general acceptance test for the more liberal standards of the Federal Rules of Evidence. Then, in the same breath, the Court reverted to maintaining the general acceptance test as a factor in the gatekeeping role.

Plaintiffs and proponents of novel scientific testimony may find it easy to forget the general acceptance standard created in the Frye decision, but the courts and defendants, unfortunately, have not. To the ultimate disappointment of those commentators who pushed for the destruction of Frye, the general acceptance standard did survive the Daubert decision, although it has taken on a new, and potentially more powerful role in summary judgment determina-

201. See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
203. See discussion supra part IV.C.
204. See supra notes 84-93 and accompanying text.
205. See supra notes 84-93 and accompanying text.
206. See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923).
207. See supra notes 84-93 and accompanying text.
208. See discussion supra part II.E.
210. Id.
211. See discussion supra part II.E.
The general acceptance test has the propensity to dominate the threshold gatekeeper inquiry, despite the Court's warning that a single factor was not to be determinative in deciding whether or not to admit expert testimony or expert affidavits in summary judgment motions. The solution for trial courts is to use Federal Rule of Evidence 706 as a tool to bridge the gap between the Federal Rules of Evidence and the Federal Rules of Civil Procedure. Although it has been largely ignored by most of

\[212. \text{See discussion supra part II.E.}\]

\[213. \text{Daubert, 113 S. Ct. at 2796-97. The conflict between Daubert and the Frye test also exists in the state courts as well as the federal courts. See, e.g., People v. Leahy, 882 P.2d 321 (Cal. 1994) (rejecting Daubert's standard for the Frye general acceptance test).}\]

\[214. \text{Daubert, 113 S. Ct. at 2796-97.}\]


\[(a) \text{Appointment. The court may in its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to the act. A witness so appointed shall be informed of the witness' duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness shall be subject to cross examination by each party, including a party calling a witness.}\]

\[(b) \text{Compensation. Expert witness so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and proceedings involving just compensation under the fifth amendment. In other civil actions and proceedings the compensation shall be paid by the parties in such a proportion and at such time as the court directs, and thereafter charged in like manner as other costs.}\]

\[(c) \text{Disclosure of Appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.}\]

\[(d) \text{Parties experts of own selection. Nothing in the rule limits the parties in calling expert witnesses of their own selection.}\]

\[Id.\]
the federal courts today, Rule 706 has the potential to alleviate most of the problems created by *Daubert* regarding the use of expert testimony. Specifically, Rule 706 can assist at the summary judgment stage of a case that involves novel scientific principles. The creation and use of a well-structured plan, as to how and when to use court-appointed experts, will not only aid in the decisionmaking process of judges, but will also support many of the courts' underlying concerns.

Second, despite all the problems with *Daubert*, there is some merit to the Court's determination that a threshold determination as to admissibility will assist and expedite the overall proceedings. However, the Court missed the chance to truly streamline the summary judgment phase and eradicate the problems that exist between the Federal Rules of Evidence and the Federal Rules of Civil Procedure in cases dealing with new or unusual forms of scientific evidence.

Therefore, prior to a court's acceptance of a summary judgment motion, the judicial process should again begin with a threshold determination through pre-trial hearings. However, the determination will not be based on whether the testimony or affidavit is admissible, but rather on the subject matter of the case. This would include identifying the issues that will require the use of expert testimony, and specifying the disputed issues of science and technology. In an effort to avoid extensive conflicts at these initial hearings, the parties will be required to meet and to file with the court, at least ten days prior to the hearing, a joint statement of the issues agreed upon and the issues in contention with regard to the scientific evidence.

From the evidence presented in the joint statement and at the hearing itself, the judge will make a pseudo Federal Rule of Evidence 702 determination as to whether expert testimony would assist the trier of fact, which in a summary judgment motion is the court. In many instances, the judge lacks the technical and scientific knowledge to make an adequate decision on the summary judgment motion, particularly when the parties' positions in terms of the proffered evi-

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216. FED. R. EVID. 706 Advisory Committee Note.
217. For instance, judicial economy will be improved by this plan.
218. This joint statement could be modeled after the Joint Case Management Conference reports that are currently used successfully in some federal district courts.
dence are diametrically opposed. In these situations, the court may, of its own volition or at the request of one or both of the parties, issue an order to show cause as to why an expert witness or witnesses should not be appointed pursuant to Rule 706.219

The expert will be selected at the court's discretion from a list the parties will be required to produce in their joint statement prior to the pre-trial hearing. The list will consist of at least three experts that the parties agree on and their qualifications in terms of the type of scientific knowledge that will be discussed in the case at bar. In the event the parties are unable to provide the court with such a list, the court will have the authority to issue sanctions as it sees fit in order to force the parties into compliance.

Once the court has determined that a Rule 706 expert would be appropriate, it must next solicit the compliance of the expert to participate in the proceeding. If granted, the expert will be required to: (1) submit a detailed brief concerning the issues in contention; (2) be deposed by either or both parties; and (3) be subjected to cross examination by both parties at the pre-trial hearing. Other issues of concern will be the costs of the court-appointed experts and the communications taking place between the expert and the parties, and the expert and the court.

Allocation of the expert's costs will be at the discretion of the judge, but as a general rule, the prevailing party should cover the bulk of the costs. Although this may seem inequitable if the defendant is granted a summary judgment motion, the expense and time saved would be far less than any litigation expenses if the parties had to proceed to trial and maintain their own set of experts. In order to avoid any unfair prejudice towards indigent parties, the court will determine the payment to the experts, based upon strict guidelines, for the period of time that the expert is needed. Through minimal increases in filing fees, or possibly surcharges paid to the court before a party is allowed to bring a suit that will require the use of expert testimony, a fund could be created for the purpose of off-setting any of the expert's charges that will not be paid by the prevailing party.

219. See supra note 215.
Ex parte communications between the court and the expert will still be discouraged as a means of protecting the integrity of the court. However, in the event it is necessary, all communications between the court and expert must be fully disclosed to all parties involved. In addition, however, there will be no communication between the expert and either party except for during judicial proceedings and depositions. This will be a precautionary measure to cut down on any bias or prejudice that might result from inequitable interaction by any of the parties.

This simplistic model of how court-appointed experts could work within the summary judgment proceeding will eliminate most of the problems created by the Supreme Court in the *Daubert* decision. First, it will virtually eliminate the principle-methodology analysis that caused so much confusion in the lower courts. When the parties are responsible for establishing the list of potential experts, the principle-methodology conflict is significantly dissipated, because the expert will be providing a singular interpretation of the evidence, and the court will not need to compare one testing procedure against another. It will also assist in forwarding the court's concern for uniformity, and in lessening the confusion in the lower courts by eliminating the eternal struggle for whether or not general acceptance is a prerequisite for testimony.

As a practical matter, it will allow trial judges to make educated decisions regarding whether a summary judgment should be granted. This framework would allow judges who know nothing about the scientific evidence involved in the cases to be aided in their decisionmaking process by a singular noncontradictory opinion of the factual issues in the case. By using this procedure, the Supreme Court will finally be able to succeed in doing what it claimed it wanted to do in *Daubert.* The courts will be able to eliminate the *Frye-Federal Rules of Evidence* debate, by allowing the judges to follow the liberal analysis that was so heavily emphasized by the *Daubert* decision.

In addition, the conflict between the Federal Rules of Evidence and the Federal Rules of Civil Procedure will no longer be an issue in summary judgment motions. It will no longer be an issue because the courts will be able to liberally allow

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220. See discussion *supra* part II.D.

221. See discussion *supra* part II.D.
expert testimony to be presented at this pre-trial stage. Through Federal Rule of Evidence 706 and through regulation of the more narrowly tailored Federal Rule of Civil Procedure 56, both goals can be met by this alteration of the judicial process.

Finally, the use of court-appointed experts will save both the court and the parties time and money. The use of this procedure would allow a court to eliminate meritless claims at the beginning of the procedure, because a court will be able to have a better understanding of whether or not a legal or factual dispute actually exists. A court will no longer have to analyze two separate experts' positions, and attempt to make a determination as to which side is more correct. The parties will save money, in that both sides will only be responsible for splitting the costs of one expert, no matter how the court determines that the expenses should be allocated. As a side benefit, for those parties who are afraid of what an increased use of court-appointed experts might do to the adversarial process in federal courts, the use of this structure will most likely encourage parties to investigate settlements at an earlier stage, or possibly pursue alternative dispute resolution procedures. In either event, it will directly assist in eliminating much of the backlog that exists in the federal courts today.

As a final note, some critics may argue that this proposal is not viable, given an attorney's ethical obligation to represent the client zealously. However, this position is without merit, because if both parties are compelled by order of the court to comply with a single expert for summary judgment motions, the attorneys will never be in a compromising position. Each party will present its choices, but the final determination is always left up to the court. As such, the potential for conflict is nonexistent.

VI. CONCLUSION

Many hopes and expectations surrounded the Supreme Court's recent decision in *Daubert.* However, to the disappointment of most in the legal community who were looking for changes in the admission of expert testimony in the federal courts, the decision generated more questions than an-

222. See discussion supra part II.D.
swers. The general acceptance test,223 which was supposedly
superseded by the Federal Rules of Evidence, survived the
Daubert decision224 and has begun to play an even more pow-
erful role in summary judgment motions that are supported
or opposed by expert affidavits.

Although the decision has created new turmoil in the
lower courts as to which analysis to follow, there is at least
some hope for the summary judgment proceedings. Through
the use of Federal Rule of Evidence 706,225 most of the
problems concerning expert testimony within summary judg-
ment can be resolved if an appropriate structure is created.

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223. See discussion supra part II.A.
224. See discussion supra part II.D.
225. See supra note 215.

* The author would like to thank his wife, Sausha, for her love and
support.