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Kumho Tire Co. v. Carmichael: Daubert's Gatekeeping Method Expanded To Apply To All Expert Testimony

In *Kumho Tire Co. v. Carmichael*,¹ the United States Supreme Court held that while the *Daubert* factors for determining the admissibility of expert testimony are neither determinative nor exhaustive, the gatekeeping function articulated in *Daubert* requires an examination of the reliability of all types of expert testimony and is not limited in application to scientific expert testimony.²

I. FACTUAL BACKGROUND

Plaintiffs, Patrick Carmichael, Luzviminda Carmichael, Carina Horn, Patrick Carmichael, Jr., Leona Carmichael, Shameela Carmichael, and Natimah Carmichael, were all injured in a single vehicle accident in Baldwin County, Alabama on July 6, 1993. Additionally, Janice Horn, another passenger, died from the injuries she received in this accident. The accident occurred when the driver and owner of the vehicle, Patrick Carmichael, lost control of the vehicle after the right rear tire blew out. The vehicle overturned, ejecting six of its eight occupants.³

Patrick Carmichael purchased the Ford Aerostar XL minivan on April 30, 1993 from a Dodge dealership in Washington state. The odometer at the time of sale registered 88,997 miles and had registered an additional 7011 miles at the time of the accident. The failed tire was a Hercules Superior XII Steel Belted Radial designed by defendant and manufactured in the Republic of South Korea in 1988. A visual examination of the tire revealed that it had been punctured by a nail or screw at some point and the remaining exterior holes had not been filled properly.⁴

1. 526 U.S. 137 (1999).

2. *Id.* at 141.

3. *Carmichael v. Samyang Tires, Inc.*, 923 F. Supp. 1514, 1516 (S.D. Ala. 1996).

4. *Id.* at 1516-17.

Plaintiffs brought a diversity suit against Kumho Tire on October 20, 1993, claiming the tire that blew out was defective.⁵ Plaintiffs retained a tire failure analyst, Dennis Carlson,⁶ who intended to testify that in his opinion the blowout was caused by a defect in the manufacture or design of the tire.⁷ Carlson relied on some basic features of tire technology and design;⁸ however, defendants disputed his method of determining whether a defect or abuse caused the tire to blow out.⁹

During Carlson's visual examination of the tire, he concluded that the accident was caused when the tread of the tire separated from the inner steel belted carcass.¹⁰ Carlson determined that this separation could be caused from either a defect or overdeflection, a type of tire abuse.¹¹ Carlson noted that there are four physical indicators normally present on a tire when overdeflection is the cause of failure: "(1) greater tread wear on the shoulder than in the center of the tire; (2) sidewall deterioration or discoloration; (3) abnormal bead grooving on the tire; and (4) rim flange impressions."¹² According to Carlson's method, when he visually fails to find at least two of these physical elements present, he concludes the failure was not caused by overdeflection and, therefore,

5. *Id.* at 1517. The causes of action included in the amended complaint were an action "under the Alabama Extended Manufacturer's Liability Doctrine, negligence/wantonness, and breach of warranty." *Id.*

6. *Id.* at 1518. Carlson had a masters degree in mechanical engineering and had worked in the area of tire design for Michelin America for 10 years. At the time of this action, he was employed by George R. Edwards and Associates, Inc. as a mechanical engineer. While his qualifications were in dispute, the court did not examine this issue and, for the purposes of summary judgment, assumed he was qualified as an expert on the subject. *Id.*

7. *Id.* at 1519.

8. 526 U.S. at 142. The Court described the undisputed features of tire technology relied upon in part by Carlson as follows:

A steel-belted radial tire . . . is made up of a "carcass" containing many layers of flexible cords, called "plies," along which (between the cords and the outer tread) are laid steel strips called "belts." Steel wire loops, called "beads," hold the cords together at the plies' bottom edges. An outer layer, called the "tread," encases the carcass, and the entire tire is bound together in rubber, through the application of heat and various chemicals. The bead of the tire sits upon a "bead seat," which is part of the wheel assembly. That assembly contains a "rim flange," which extends over the bead and rests against the side of the tire.

Id. (citations omitted).

9. 923 F. Supp. at 1520.

10. *Id.* at 1519.

11. *Id.* Overdeflection is the result of overinflating a tire, underinflating a tire, or both. *Id.*

12. *Id.*

must have been caused by a manufacturing or design defect.¹³ Using this method Carlson determined there was insufficient evidence to indicate overdeflection and, therefore, concluded that the blowout must have been caused by a manufacturing or design defect.¹⁴

Defendant sought summary judgment from the district court, arguing under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁵ that Carlson's testimony was inadmissible as expert testimony.¹⁶ The district court first noted that "*Daubert* imposed upon trial courts a sort of gatekeeper function in accordance with which they must 'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'"¹⁷ The district court then articulated the four *Daubert* factors as follows:

- (1) whether the technique or theory used may be tested or refuted; (2) whether the technique or theory has been a subject of peer review or publication; (3) the known or potential rate of error of a technique; and (4) the degree of acceptance of a theory or technique within the relevant scientific community.¹⁸

Finally, the district court applied the four *Daubert* factors to the case, finding first that Carlson's method was not "susceptible to testing" in that the results were "subjective" and there was some degree of "uncertainty."¹⁹ The district court next found that there were no publications that "approved or otherwise discussed [Carlson's] techniques for tire failure analysis."²⁰ Applying the third factor, the district court found that the "potential error rate of the technique" could not be determined accurately with Carlson's method.²¹ Finally, in applying the fourth factor, the district court found that there was simply

13. *Id.* Carlson did find "some evidence of uneven tread wear, sidewall deterioration, abnormal bead grooving, and rim flange impressions." *Id.* He concluded that this evidence was insufficient to show overdeflection. *Id.*

14. *Id.*

15. 509 U.S. 579 (1993).

16. 923 F. Supp. at 1520. Defendants also sought summary judgment on the ground that Carlson's testimony did not offer evidence that the failure was the result of a defect and not abuse. *Id.* However, rejecting defendants' argument, the district court found that reaching the result by the process of elimination was not per se invalid as long as the methodology was valid. *Id.* at 1520 n.7.

17. *Id.* at 1520 (quoting *Daubert*, 509 U.S. at 589).

18. *Id.* (citing *Daubert*, 509 U.S. at 589-95).

19. *Id.*

20. *Id.* at 1521.

21. *Id.* The court noted specifically that there was "no evidence that [anyone] has tested [these] methods in a controlled laboratory setting to gauge their accuracy in correctly distinguishing between overdeflected and defective tire separations." *Id.*

insufficient evidence submitted to draw the conclusion that Carlson's methodology is "generally accepted in the relevant scientific community."²² The district court concluded that these factors applied whether the evidence was scientific or technical in nature under the gatekeeping rationale of *Daubert* and that the factors set forth had not been met.²³ Therefore, the district court found the expert testimony inadmissible and granted defendants' motion for summary judgment.²⁴

Plaintiffs appealed, arguing the *Daubert* factors did not apply to the admissibility of Carlson's testimony because he was not a scientific expert.²⁵ The Eleventh Circuit agreed, noting that the Supreme Court in *Daubert* "explicitly limited its holding to cover only the 'scientific context.'"²⁶ The court explained that although "*Daubert* may suggest reliability issues for district courts to consider . . . under Rule 702, 'the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system.'"²⁷ The court then described the difference between scientific and nonscientific evidence and found that Carlson's testimony was not scientific expert testimony because it relied primarily upon his experience in analyzing failed tires.²⁸ The Eleventh Circuit reversed and remanded the case for further proceedings, holding that the district court erred as a matter of law when it applied the *Daubert* factors to Carlson's testimony.²⁹

The United States Supreme Court granted certiorari to determine if and how *Daubert* applies to expert testimony that is not scientific in nature.³⁰ The Supreme Court reversed the Eleventh Circuit's holding that the *Daubert* factors apply only to the admissibility of scientific expert testimony.³¹ The Court held that the gatekeeping function as articulated in *Daubert* applies to all expert testimony, not just to

22. *Id.* The court noted that the only evidence submitted was Carlson's statement that other tire experts use this method and excerpts from the deposition of another tire expert. *Id.* The court concluded that the submitted deposition was not supportive of plaintiffs' claim. *Id.*

23. *Id.* at 1522. Plaintiffs had argued that *Daubert* did not apply because Carlson's testimony was technical, not scientific, in nature. *Id.*

24. *Id.*

25. *Carmichael v. Samyang Tire, Inc.*, 131 F.3d 1433, 1435 (11th Cir. 1997).

26. *Id.* (citing *Daubert*, 509 U.S. at 590 n.8).

27. *Id.* (quoting *United States v. 14.38 Acres of Land*, 80 F.3d 1074, 1078 (5th Cir. 1996)).

28. *Id.* at 1435-36. The court explained that a "scientific expert is an expert who relies on the application of scientific principles, rather than on skill- or experience-based observation, for the basis of his opinion." *Id.* at 1435 (citing *Daubert*, 509 U.S. at 590).

29. *Id.* at 1437.

30. 526 U.S. at 141.

31. *Id.*

scientific expert testimony.³² The Court explained that the “test of reliability is ‘flexible,’ and *Daubert*’s list of specific factors neither necessarily nor exclusively applies to all experts or in every case.”³³ The Court noted that a district court has the same discretionary power under the law to decide “how to determine reliability as it enjoys in respect to its ultimate reliability determination.”³⁴ Finally, the Court concluded that the district court acted within its discretion when it decided not to admit the expert testimony of the tire analyst.³⁵

II. LEGAL BACKGROUND

A. Admissibility of Expert Testimony Under *Frye v. United States*

In *Frye v. United States*,³⁶ the “general acceptance” test for the admissibility of novel scientific expert testimony was born.³⁷ Under the *Frye* test, proffered novel scientific evidence was admissible only if it was generally accepted within the relevant scientific community.³⁸ As the Court in *Daubert* pointed out, this was the sole criteria for admissibility under the *Frye* standard.³⁹ This test was adopted by a majority of jurisdictions to determine the admissibility of novel scientific expert testimony.⁴⁰ The Court of Appeals for the District of Columbia Circuit announced its decision in *Frye* in 1923 in a two-page opinion.⁴¹ The court examined the issue of whether a type of lie-detecting method was admissible in a criminal case.⁴² The court determined that the proffered evidence was inadmissible because it had not gained general acceptance within the relevant scientific community.⁴³

32. *Id.*

33. *Id.*

34. *Id.* at 142 (citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997)).

35. *Id.*

36. 293 F. 1013 (D.C. Cir. 1923).

37. *Daubert*, 509 U.S. at 585.

38. 293 F. at 1014.

39. 509 U.S. at 589.

40. *Id.* at 585.

41. 293 F. at 1013-14.

42. *Id.* at 1013. More specifically, defendant proffered evidence of a “systolic blood pressure deception test.” *Id.*

43. *Id.* at 1014. In its most quoted passage, the court in *Frye* stated:

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

Commentators and courts alike have debated the application of *Frye* for decades. One advantage with the *Frye* rule was that it relieved courts of the duty to make an independent determination on the reliability of scientific evidence.⁴⁴ This, in turn, reduced the need for spending the court's time and attention on these rulings through hearings, and it permitted the court to leave the determination to the scientific community, which many felt was the proper place for the decision to be made.⁴⁵

However, many commentators have noted *Frye's* disadvantages. For example, the test tended to be inflexible because new scientific knowledge and technology that may be both relevant and reliable would be considered inadmissible if the scientific community had not yet widely accepted it.⁴⁶ Furthermore, the courts struggled to determine how to define the relevant scientific community, just what scope the term "general acceptance" included, whether the standard applied to both "the underlying principle and the technique applying it," and whether to apply *Frye* only to novel scientific evidence or to all scientific evidence.⁴⁷ While the *Frye* test stood dominant for decades, the debate raged on.⁴⁸

B. Admissibility of Expert Testimony After Enactment of Rule 702

The conflict among the circuits over application of the *Frye* test after the enactment of the Federal Rules of Evidence was indicative of the general confusion and growing disapproval of the test.⁴⁹ The enactment of Rule 702 of the Federal Rules of Evidence in 1975 did little to reduce the confusion concerning the proper test that should be applied.⁵⁰

particular field in which it belongs.

Id.

44. 29 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 6266 (1997).

45. Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1207 (1980).

46. WRIGHT & GOLD, *supra* note 44.

47. Giannelli, *supra* note 45, at 1210-12.

48. WRIGHT & GOLD, *supra* note 44; see also 1 MCCORMICK ON EVIDENCE § 203, at 874-75 (John W. Strong ed., 4th ed. 1992); Michael D. Green, *Expert Witnesses and Sufficiency of Evidence in Toxic Substances Litigation: The Legacy of Agent Orange and Bendectin Litigation*, 86 NW. U. L. REV. 643 (1992); Roger S. Hanson & James Alphonzo, *Frye is Sixty-Five Years Old; Should He Retire?*, 16 W. ST. U. L. REV. 357 (1989); Bert Black, *A Unified Theory of Scientific Evidence*, 56 FORDHAM L. REV. 595 (1988); Giannelli, *supra* note 45.

49. Giannelli, *supra* note 45, at 1228-31.

50. *Id.* at 1228-29.

First, the Federal Rules of Evidence did not codify *Frye*.⁵¹ In fact, the drafting history of Rule 702 does not give any guidance because it does not address *Frye*.⁵² Finally, the Federal Rules of Evidence as a whole “adopted a liberal approach toward admitting relevant evidence.”⁵³ This led many commentators to the conclusion that *Frye* did not survive the adoption of the Federal Rules of Evidence.⁵⁴

The courts were split concerning the application of *Frye* after the adoption of the Federal Rules of Evidence.⁵⁵ Some held that the Rules superceded *Frye*, while others manipulated the test or rejected it for other reasons⁵⁶ and began using a reliability standard promulgated primarily from Rule 702.⁵⁷ The Second Circuit, in *United States v. Williams*,⁵⁸ declined to follow the *Frye* standard and adopted an examination of reliability through the application of several factors.⁵⁹ The court in *Williams* examined the admissibility of spectrographic voice analysis evidence in a criminal case.⁶⁰ The court noted specifically that “[a] determination of reliability cannot rest solely on a process of ‘counting [scientific] noses.’”⁶¹ The court further noted that the determination of the admissibility of scientific evidence should not be delegated to scientists, regardless of the “‘voting’ pattern.”⁶² The court then articulated several factors that indicate reliability.⁶³ These include the potential rate of error, the existence and maintenance of standards, the care taken with the methodology, and similarity with other scientific techniques.⁶⁴ The holding in *Williams*, as emphasized in *United States v. Jakobetz*,⁶⁵ was that Rule 702 had superceded the *Frye* general acceptance standard and created a more liberal approach to the examination of the reliability of scientific expert testimony.⁶⁶

51. *Id.* at 1229.

52. *Id.*; *Daubert*, 509 U.S. at 588.

53. WRIGHT & GOLD, *supra* note 44.

54. *Id.*

55. Giannelli, *supra* note 45, at 1228.

56. *Id.*

57. *See, e.g.*, *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985).

58. 583 F.2d 1194 (2d Cir. 1978).

59. *Id.* at 1198-99.

60. *Id.* at 1197.

61. *Id.* at 1198.

62. *Id.*

63. *Id.*

64. *Id.* at 1198-99.

65. 955 F.2d 786 (2d Cir. 1992).

66. *Id.* at 794 (citing *Williams*, 583 F.2d at 1198).

Similarly, the Third Circuit, in *United States v. Downing*,⁶⁷ examined the exclusion of expert testimony of an eyewitness identification expert.⁶⁸ The court rejected the *Frye* test primarily because of policy considerations and employed a reliability standard formulated by the court from Rule 702.⁶⁹ The court noted many of the criticisms and concerns that arose in applying the *Frye* test.⁷⁰ For example, the court noted that the *Frye* test relied upon vague terms that "have allowed courts to manipulate the parameters of the relevant 'scientific community' and the level of agreement needed for 'general acceptance.'"⁷¹ Further, the court recognized that reliable novel scientific techniques could be excluded under *Frye*, "thereby unnecessarily impeding the truth-seeking function of litigation."⁷² Finally, the court noted that the *Frye* test was conservative in its approach and "at odds with the spirit, if not the precise language, of the Federal Rules of Evidence."⁷³ The court therefore rejected the general acceptance standard as an "independent controlling standard of admissibility."⁷⁴

The courts remained divided on the applicability of *Frye* after the enactment of the Federal Rules of Evidence.⁷⁵ While a majority of courts still followed the general acceptance standard, there were a growing number of courts that rejected the *Frye* standard.⁷⁶ The conflict among the circuits and the confusion in the application of *Frye* and Rule 702 remained unresolved until 1993, eighteen years after the enactment of the Federal Rules of Evidence.

C. Admissibility of Expert Testimony After Daubert

Oddly enough, the Supreme Court did not address the coexistence of the *Frye* general acceptance test and Rule 702 until 1993 in *Daubert*.⁷⁷ In *Daubert* the Court held that the enactment of the Federal Rules of

67. 753 F.2d 1224 (3d Cir. 1985).

68. *Id.* at 1226.

69. *Id.* at 1237. The court held specifically on this issue that "a particular degree of acceptance of a scientific technique within the scientific community is neither a necessary nor a sufficient condition for admissibility; it is, however, one factor that a district court normally should consider in deciding whether to admit evidence based upon the technique." *Id.*

70. *Id.* at 1236-37 (citing *Giannelli*, *supra* note 45, at 1208-21).

71. *Id.* at 1236.

72. *Id.*

73. *Id.* at 1237.

74. *Id.*

75. WRIGHT & GOLD, *supra* note 44.

76. *Daubert*, 509 U.S. at 585.

77. *Id.* at 585-90.

Evidence superceded *Frye*.⁷⁸ The Court's analysis focused on the facts that nothing in the text of Rule 702 supported the general acceptance standard and that the standard was inconsistent with the "liberal thrust" of the Rules.⁷⁹ Furthermore, the Court did not limit application of the reliability examination under Rule 702 to novel scientific evidence, but included all scientific expert evidence.⁸⁰ The Court then adopted a test similar to that in *Williams*, holding that application of a nonexclusive list of factors should be applied by district courts to determine the reliability of scientific expert testimony.⁸¹ These factors include whether the theory or technique (1) "can be (and has been) tested," (2) has been the subject of "peer review and publication," (3) has a "known or potential rate of error," and (4) has been "general[ly] accept[ed]" within "a relevant scientific community."⁸² The Court emphasized that the test for admissibility under Rule 702 was a flexible one, but that it nonetheless delegated to trial court judges a "gatekeeping role" concerning the reliability of evidence.⁸³

While *Daubert* seemed to put an end to the confusion regarding the application of the general acceptance standard and Rule 702, it also created some confusion of its own. The Court in *Daubert* seemed to limit its holding to scientific expert testimony.⁸⁴ The circuit courts applying *Daubert* have not taken a uniform approach—some courts limited application of *Daubert* to scientific expert testimony, while other courts applied the standard to technical and other types of expert testimony.⁸⁵

For example, the Seventh Circuit, in *Cummins v. Lyle Industries*,⁸⁶ held that the *Daubert* factors apply to the admissibility of expert testimony other than scientific expert testimony.⁸⁷ The court examined the language from *Daubert* and noted that while the holding in *Daubert* was limited to scientific expert testimony, the Supreme Court stated that "its holding was not limited to cases involving 'novel' scientific theo-

78. *Id.* at 589.

79. *Id.* at 588 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

80. *Id.* at 592 n.11. The court noted that "the requirements of Rule 702 [do not] apply specially or exclusively to unconventional evidence." *Id.*

81. *Id.* at 593-94.

82. *Id.*

83. *Id.* at 594-95.

84. *Id.* at 597.

85. *Kumho Tire*, 526 U.S. at 146-47 (citing *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 990-91 (5th Cir. 1997); *Compton v. Subaru of Am., Inc.*, 82 F.3d 1513, 1518-19 (10th Cir. 1996)).

86. 93 F.3d 362 (7th Cir. 1996).

87. *Id.* at 367.

ries.⁸⁸ Finally, the court concluded that the “task of the district court remain[ed] essentially the same—to ensure that the evidentiary submission is of an acceptable level of ‘evidentiary reliability.’”⁸⁹

However, the Tenth Circuit, in *Compton v. Subaru of America, Inc.*,⁹⁰ concluded that the *Daubert* analysis does not apply to the admissibility of all kinds of expert testimony.⁹¹ The court first examined the application of Rule 702 that the Tenth Circuit used prior to *Daubert*.⁹² The court noted that the “touchstone” in its Rule 702 analysis with regard to admissibility was “‘helpfulness to the trier of fact,’”⁹³ and “‘as long as a logical basis exists for an expert’s opinion . . . the weaknesses in the underpinnings of the opinion[] go to the weight and not the admissibility of the testimony.’”⁹⁴ The court explained that this Rule 702 analysis was applicable to determine the admissibility of nonscientific expert testimony and that the *Daubert* factors only applied to scientific expert testimony.⁹⁵ The court reasoned that application of the *Daubert* factors was a further Rule 702 inquiry under certain circumstances.⁹⁶ The court recognized the gatekeeping duty from *Daubert*, but concluded that the *Daubert* factors were not applicable in cases “where expert testimony is based solely upon experience or training.”⁹⁷

In conclusion, *Daubert* answered a question that had lingered for over a decade: whether the *Frye* general acceptance standard was applicable after the enactment of the Federal Rules of Evidence.⁹⁸ However, by limiting its holding to scientific expert testimony, the Supreme Court left a gap in the application of Rule 702 that the circuit courts subsequently filled inconsistently.⁹⁹ The Supreme Court addressed this issue specifically in *Kumho Tire* in 1999.

88. *Id.* at 367 n.2 (citing *Daubert*, 509 U.S. at 592 n.11).

89. *Id.* (citing *Daubert*, 509 U.S. at 590).

90. 82 F.3d 1513 (10th Cir. 1996).

91. *Id.* at 1518.

92. *Id.*

93. *Id.* (quoting *Werth v. Makita Elec. Works, Ltd.*, 950 F.2d 643, 648 (10th Cir. 1991)).

94. *Id.* (quoting *Jones v. Otis Elevator Co.*, 861 F.2d 655, 663 (11th Cir. 1988)) (alteration by court).

95. *Id.*

96. *Id.* at 1519.

97. *Id.* at 1518.

98. 509 U.S. at 589.

99. *Kumho Tire*, 526 U.S. at 147-49.

III. RATIONALE OF THE COURT

Writing for an eight-to-one majority, Justice Breyer delivered the opinion of the Court in *Kumho Tire*.¹⁰⁰ The Court reversed the circuit court and held that the district court properly exercised its discretion in applying the *Daubert* factors to expert testimony proffered by plaintiffs even though it was not scientific expert testimony.¹⁰¹ Justice Breyer began his analysis by examining the plain language of Rule 702, and he determined that it “[made] no relevant distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge.”¹⁰² The Court explained first that the language of the Rule covered all types of expert testimony.¹⁰³ The Court further examined the language of the Rule and determined, as it had in *Daubert*, that the key word was “knowledge,” which modified the words “expert testimony”; as such, the “reliability standard” of the Rule applies to particular types of knowledge covered by the Rule.¹⁰⁴ As the Court further explained, the words “scientific,” “technical,” and “other specialized” simply describe the types of “knowledge” that may be classified as expert testimony.¹⁰⁵ The Court concluded that “as a matter of language, the Rule applies its reliability standard to all ‘scientific,’ ‘technical,’ or ‘other specialized’ matters within its scope.”¹⁰⁶

The Court then analyzed the rationale and policy concerns as to the practical application of the Rule. The Court noted that expert testimony that was not scientific in nature was given the same “testimonial latitude” as expert testimony that was considered scientific.¹⁰⁷ The Court explained that under Rules 702 and 703, all expert witnesses are permitted “testimonial latitude unavailable to other witnesses on the

100. Justice Stevens joined in parts I and II, but dissented as to part III. Justice Scalia filed a concurring opinion that Justices O'Connor and Thomas joined.

101. 526 U.S. at 141-42.

102. *Id.* at 147. Rule 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.

103. 526 U.S. at 147.

104. *Id.* The Court conceded “that *Daubert* referred only to ‘scientific’ knowledge . . . ‘because that was the nature of the expertise’ at issue.” *Id.* at 147-48 (quoting *Daubert*, 509 U.S. at 590 n.8).

105. *Id.* at 147 (citing *Daubert*, 509 U.S. at 589-90).

106. *Id.*

107. *Id.* (citing *Daubert*, 509 U.S. at 592). The testimonial latitude generally available to expert witnesses includes the ability to give opinions, to offer opinions outside personal knowledge, and to answer hypothetical questions. *Id.*

'assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline.'¹⁰⁸ The Court also recognized that practical application of a rule that created a distinction between scientific and other types of expert testimony would be administratively difficult, if not impossible.¹⁰⁹ The Court observed that "[t]here is no clear line that divides the one from the others."¹¹⁰ The Court explained not only that would it be difficult to distinguish between "[p]ure scientific theory" and "observation and engineered machinery," but also that the approach would not produce "clear legal lines capable of application in particular cases."¹¹¹ Finally, the Court noted that this distinction is unnecessary because the reason for the rule is to assist the jury in evaluating foreign experiences.¹¹² The Court explained that expert testimony that focuses on "specialized observations, the specialized translation of those observations into theory, a specialized theory itself, or the application of such a theory in a particular case, . . . will rest 'upon an experience confessedly foreign in kind to [the jury's] own.'¹¹³ To further its goal of assisting juries in evaluating foreign experiences, the Court concluded that the trial judge should evaluate the relevance and reliability of the testimony regardless of whether it is scientific.¹¹⁴

The Court then examined more specifically the factors that may be used in determining reliability of expert testimony under *Daubert's* gatekeeping obligation.¹¹⁵ While the Court held that the articulated factors from *Daubert* may be used by the trial judge in evaluating the testimony of the engineering expert, the Court focused on the word "may" and emphasized that the application is "flexible."¹¹⁶ The Court noted that the factors articulated in *Daubert* "do not constitute a 'definitive checklist or test.'¹¹⁷ The Court further noted that determining what factors to use when assessing reliability cannot be

108. *Id.* (quoting *Daubert*, 509 U.S. at 592). The Court parenthetically noted that in *Daubert* it discussed an element of this testimonial latitude by pointing out that expert witnesses may testify concerning their opinions regardless of whether these opinions are based upon firsthand knowledge or observation. *Id.* (citing *Daubert*, 509 U.S. at 592).

109. *Id.*

110. *Id.* at 148.

111. *Id.* The Court cited as illustrations several amicus curiae, some arguing that engineering is a science and others arguing the opposite. *Id.*

112. *Id.* at 148-49.

113. *Id.* (quoting Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901)) (alteration by court).

114. *Id.* at 149.

115. *Id.* at 150.

116. *Id.* (citing *Daubert*, 509 U.S. at 594).

117. *Id.* (quoting *Daubert*, 509 U.S. at 593).

articulated in a rule, or even a set of rules, because “[t]oo much depends upon the particular circumstances of the particular case at issue.”¹¹⁸ The Court “agree[d] with the Solicitor General that ‘[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.’”¹¹⁹ The Court concluded that the factors articulated in *Daubert* may be used with expert testimony “where they are reasonable measures of the reliability of expert testimony” because this is consistent with the objective of *Daubert*’s gatekeeping obligation.¹²⁰

After analyzing the proper approach to *Daubert*’s gatekeeping obligation concerning expert testimony, the Court explained the discretionary nature of the trial court’s determination of the reliability of expert testimony.¹²¹ The Court noted that a trial judge has discretionary authority to determine whether to admit or exclude expert testimony and, therefore, concluded that consistency demanded that this same discretionary authority be granted regarding how the trial judge determines reliability of expert testimony.¹²² The Court explained that discretionary authority was needed “to avoid unnecessary ‘reliability’ proceedings in ordinary cases . . . and to require appropriate proceedings in the less usual or more complex cases.”¹²³ Finally, the Court noted that this approach was consistent with the policy underlying the Federal Rules of Evidence requiring that “unjustifiable expense and delay” be avoided.¹²⁴

IV. IMPLICATIONS

The Supreme Court in *Kumho Tire* addressed the proper application of the *Daubert* factors and the district court’s obligation as a gatekeeper in the admissibility of all expert testimony. While the district courts have broad discretion and flexibility in the application of this gatekeeping function, expert testimony must be examined for both relevance and reliability.¹²⁵ This decision, along with *Daubert*, attempts to settle

118. *Id.*

119. *Id.* (quoting Brief for United States as *Amicus Curiae* at 19, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (No. 97-1709)) (second alteration by court).

120. *Id.* at 152.

121. *Id.* The Court noted that this discretion is warranted whether the trial court is determining the reliability of expert testimony or determining if “special briefing or other proceedings are needed to investigate reliability.” *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 152-53 (citing FED. R. EVID. 702).

125. *Id.* at 152.

decades of confusion among the circuits concerning the proper approach for examining the reliability of expert testimony. The holding in *Kumho Tire* creates a uniform obligation and approach, albeit with broad discretion and flexibility, in the examination of all expert testimony under Rule 702.¹²⁶ This approach is preferable over both the *Frye* and *Daubert* tests—as applied only to scientific expert testimony by some courts—because it addresses all types of expert testimony and closes the gaps historically left by these other approaches.

However, it remains to be seen if the district courts will uniformly apply Rule 702 to the admissibility of expert testimony with the same rigor. Because of the flexibility of the standard articulated in *Kumho Tire*, there is a possibility that some courts will examine the admissibility of expert testimony with greater rigor and will be more willing to exclude expert testimony that has been generally accepted under previous standards. Significantly, the Supreme Court did not apply Rule 702 to disqualify certain classes of expert testimony, but focused on the methodology of the particular expert in that case, reserving the possibility that another expert employing reliable methods and reaching the same result could properly testify. Because the procedure now requires the judge to evaluate the merits of all expert testimony without deference to “recognized” fields of reliable expertise, new and innovative technological advances, not having been accepted widely by the scientific community, may be utilized by experts to assist the jury as long as the methodology used is reliable. Further, areas of expertise that have been more readily admissible in the past will be subject to more rigorous examination to ensure that the general area of expertise offered by the witness, although historically relied upon by the scientific community, is based on a reliable methodology utilized by the expert offering the testimony. This focus on the methodology used, instead of the area of expertise, will probably be the primary focus of the application of Rule 702 in future admissibility determinations.

Several cases applying the *Daubert* factors to the admissibility of nonscientific expert testimony since the Supreme Court’s decision in *Kumho Tire* reveal a willingness to examine rigorously the methodology of the expert in question rather than qualify a particular subject of expert testimony as inadmissible. The Fourth Circuit, in *Oglesby v. General Motors Corp.*,¹²⁷ examined the expert testimony of a qualified mechanical engineer proffered by plaintiff to prove that a plastic inlet connector for a truck radiator hose was defective.¹²⁸ The court specifi-

126. *Id.* at 153.

127. 190 F.3d 244 (4th Cir. 1999).

128. *Id.* at 247.

cally examined the expert's methodology, noting that his entire "investigation into the part or its manufacture" consisted of visually examining the part, taking physical measurements of the part, and photographing the parts.¹²⁹ The court also noted that plaintiff's proffered expert did not know what material the part was made from or how the part was manufactured, nor did the expert perform any tests on the part.¹³⁰ The court concluded that the methodology used by the expert was unreliable and held that the district court erred in not excluding the testimony.¹³¹

The Sixth Circuit, in *Greenwell v. Boatwright*,¹³² examined the expert testimony of an accident reconstructionist and concluded that the expert testimony met the *Daubert* admissibility test.¹³³ Plaintiff argued that eyewitness testimony contradicted the conclusion of the expert proffered by defendant.¹³⁴ The court noted that under *Daubert*, the "reliability requirement is designed to focus on the methodology and principles underlying the testimony."¹³⁵ The court further noted that plaintiff did not challenge "the expert's credentials as to accident reconstruction[,] . . . the scientific formulas the expert used[,] . . . [or] the physical evidence the expert used."¹³⁶ The court, therefore, concluded that the admission of the expert testimony was proper under the *Daubert* standard.¹³⁷

An examination of these cases from the Fourth and Sixth Circuits illustrates the determination of these courts to apply the *Daubert* factors and examine the reliability of the expert's testimony based on the methodology used and not the type of expert testimony offered. This approach not only permits the use of new technological advances, but also has the added benefit of requiring a more thorough investigation and examination by most experts preparing for trial because the methodology of the expert will be thoroughly tested. These results are consistent with the liberal approach to admissibility underlying the

129. *Id.* at 247-48.

130. *Id.* at 248.

131. *Id.* at 251.

132. 184 F.3d 492 (6th Cir. 1999).

133. *Id.* at 498.

134. *Id.* at 497.

135. *Id.* at 496-97 (citing *United States v. Bonds*, 12 F.3d 540, 556 (6th Cir. 1993)).

136. *Id.* at 497.

137. *Id.* at 498. There was a strong dissent by Judge Merritt, who found the expert testimony unreliable under the *Daubert* standard and would have reversed because the eyewitnesses contradicted the conclusions of the expert. *Id.* at 501-03 (Merritt, J., dissenting).

Federal Rules of Evidence as well as the concern behind Rule 702 that such testimony be reliable.

Because the district courts have such broad discretion, the implications involve not only the substantive aspects of a party's case, but also procedural concerns in the area of litigation. In many cases, as in *Kumho Tire*, a party's claim relies primarily upon the admission of expert testimony.¹³⁸ Thus, the outcome of many cases will depend heavily on the determination made by the district court judge, who will place increased emphasis upon the hearing determining admissibility and the pretrial discovery of experts. While this may lead to increased costs of litigation in some cases, it also has the potential to decrease costs by ending some cases at an earlier stage. It further has the advantage of minimizing the effects on the jury of "junk" science and experts who work simply as "hired guns."

Finally, in response to the lack of uniformity and the difficulty courts have had in applying Rule 702, an amendment to Rule 702 has been proposed. The proposed amendment embraces the trial court's role as a gatekeeper in assessing the reliability of all expert testimony for the purposes of admissibility.¹³⁹ The amendment reinforces the approach taken by the Supreme Court in *Daubert* and *Kumho Tire* by requiring that all expert evidence, whether scientific or technical, be examined with the same rigor.¹⁴⁰ Significantly, the amendment requires reliability not only in the methodology used, but also in the application of that methodology by the expert witness.¹⁴¹ This echoes the concern that only helpful, reliable information should reach the jury, but retains the flexibility necessary to further the liberal approach embraced by the Federal Rules of Evidence. In conclusion, it is unclear just how rigorously the courts will apply this flexible standard; but it seems

138. 526 U.S. at 142.

139. The text of the proposed amendment to Rule 702 reads as follows:

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, provided that (1) the testimony is sufficiently based upon reliable facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND EVIDENCE 122 (Aug. 1998).

140. Daniel J. Capra, *Evidence Amendments*, NAT'L L.J., Oct. 5, 1998, at B11.

141. *Id.*

relatively certain that it will remain the standard even if Rule 702 is amended.¹⁴²

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142. The proposed amendment, if no adverse action is taken, will become law on December 1, 2000. *Id.*

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