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DEVELOPMENTS OF THE LAW OF EXPERT TESTIMONY IN OKLAHOMA: THE FALLACY OF THE SO-CALLED NON-NOVEL EXCEPTION TO *DAUBERT*

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In 2003, the Oklahoma Supreme Court decided the case of *Christian v. Gray*.[1] In *Christian*, the court adopted the procedures set forth by the U.S. Supreme Court in *Kumho Tire Co. v. Carmichael*[2] and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[3] for determining the admissibility of expert testimony in civil cases in Oklahoma.[4] Since then, Oklahoma courts have refined the applicability of the *Daubert* process and made clear the procedures that must be followed to preserve an issue of admissibility of expert testimony for appellate review. This Article gives a brief review of *Daubert* and its adoption in Oklahoma, discusses the Oklahoma courts' application of *Daubert* to various types of expert testimony, explores the non-novel exception to the *Daubert* rule as applied by Oklahoma courts, and discusses how the Oklahoma Supreme

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1. Christian v. Gray, 2003 OK 10, 65 P.3d 591.
2. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).
3. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).
4. *Christian*, 2003 OK 10, ¶ 14.

Court requires a *Daubert* issue to be raised in the trial court to preserve the question for appellate review.

I. DEVELOPING THE *DAUBERT* RULE

A. Daubert v. Merrell Dow Pharmaceuticals, Inc.

Before there was the *Daubert* rule, there was the *Frye* test. *Frye v. United States*[5] allowed the admission of scientific evidence only if the scientific theory was a "generally accepted" principle of science.[6] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Court replaced the *Frye* test.[7] In his opinion for the *Daubert* Court, Justice Blackmun coined the term "gatekeeper" and clarified the role of the trial judge as being a gatekeeper responsible for determining the admissibility of evidence.[8] "[T]he trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[9] Under *Daubert*, the expert's testimony must be "scientific knowledge" in order to be deemed relevant.[10] The Court in *Daubert* outlined four factors that the trial court may consider when performing its gatekeeper role in determining the admissibility of the proffered expert testimony. Those factors are:

1. Whether the "theory or technique . . . can be (and has been) tested";
2. Whether it "has been subjected to peer review and publication";
3. Whether a particular technique has a high "known or potential rate of error" and whether there are "standards controlling the technique's operation"; and
4. Whether the theory or technique has been generally accepted within a "'relevant scientific community.'"[11]

5. Frye v. United States, 293 F. 1013 (D.C. Cir. 1923).
6. *Id.* at 1014.
7. *Daubert*, 509 U.S. at 587.
8. *See id.* at 597.
9. *Id.* at 589.
10. *Id.* at 589–90.
11. *Id.* at 593–94 (quoting United States v. Downing, 753 F.2d 1224, 1238 (3rd Cir. 1985)).

B. General Electric Co. v. Joiner

In 1997, the Supreme Court revisited the expert witness issue in *General Electric Co. v. Joiner*.[12] The Eleventh Circuit Court of Appeals had reversed the district court's exclusion of plaintiff's expert in a smoker's product liability case.[13] The Eleventh Circuit reasoned that Rule 702 displayed "'a preference for admissibility.'"[14] Therefore, the Eleventh Circuit held it would "'apply a particularly stringent standard of review to the trial judge's exclusion of expert testimony.'"[15] In a unanimous opinion, the Court held that abuse of discretion is the standard of review for reviewing a district court's evidentiary ruling, regardless of whether the ruling allowed or excluded expert testimony.[16]

C. Kumho Tire Co. v. Carmichael

In *Kumho*, the Supreme Court extended its holding in *Daubert* to apply to all forms of expert testimony.[17] The Supreme Court granted certiorari to determine "whether, or how, *Daubert* applies to expert testimony that might be characterized as based not upon 'scientific' knowledge, but rather upon 'technical' or 'other specialized' knowledge" under Federal Rule of Evidence 702.[18] The Court held:

> We conclude that *Daubert's* general holding—setting forth the trial judge's general "gatekeeping" obligation—applies not only to testimony based on "scientific" knowledge, but also to testimony based on "technical" and "other specialized" knowledge. See Fed. Rule Evid. 702. We also conclude that a trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert*'s list of specific factors neither necessarily nor exclusively applies to all experts

12. Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997).
13. *Id.* at 140.
14. *Id.* (quoting Joiner v. Gen. Elec. Co., 78 F.3d 524, 529 (11th Cir. 1996), *rev'd*, 522 U.S. 136 (1997)).
15. *Id.* (quoting *Joiner*, 78 F.3d at 529).
16. *Id.* at 142.
17. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999).
18. *Id.* at 146–47.

> or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.[19]

Justice Breyer, writing for the Court, emphasized that *Daubert* makes it clear that the four factors listed are not a definitive checklist for the admissibility of the proffered expert testimony.[20] The factors were only "meant to be helpful."[21] The Court noted that the "factors do not all necessarily apply . . . in every instance in which the reliability of scientific testimony is challenged."[22] The Court concluded that, with *Daubert* as a guide, "Rule 702 grants the district judge the discretionary authority, reviewable for its abuse, to determine reliability in light of the particular facts and circumstances of the particular case."[23]

II. THE OKLAHOMA APPLICATION OF *DAUBERT*

In *Taylor v. State*, the Oklahoma Court of Criminal Appeals adopted the *Daubert* standard for admissibility of expert testimony regarding scientific evidence to replace the previously applied *Frye* test.[24] The court held that it was time "to abandon the *Frye* test and adopt the more structured yet flexible admissibility standard" of *Daubert*.[25] The *Taylor* court analyzed the *Daubert* procedure and suggested that it would provide a more "uniform method of addressing the admissibility of expert testimony [for] all types of scientific evidence."[26] Under *Daubert* and *Taylor*, an Oklahoma trial court must conduct a pretrial hearing to determine the relevance and reliability of the proffered expert testimony.[27] As *Taylor* emphasized, "*Daubert* makes clear that trial judges must continue to act as gatekeepers, ensuring that all novel scientific evidence is both reliable and relevant."[28]

In *Gilson v. State*, the Oklahoma Court of Criminal Appeals noted that *Kumho* "extended *Daubert* to testimony based on 'technical' and

19. *Id.* at 141–42.
20. *Id.* at 151.
21. *Id.*
22. *Id.*
23. *Id.* at 158.
24. Taylor v. State, 1995 OK CR 10, 889 P.2d 319, 328.
25. *Id.*
26. *Id.* at 329.
27. *Id.* at 339.
28. *Id.* at 329.

'other specialized' knowledge."[29] The court also highlighted that *Daubert*'s specific factors are not an exclusive list and that the trial judge has broad latitude in determining the relevance and reliability of the proffered expert testimony.[30] The most significant holding of the *Gilson* case, however, is not its observation that *Kumho* extends *Daubert* to all forms of expert testimony but rather the material change in the standard of review to be applied in Oklahoma criminal cases. The Court of Criminal Appeals had previously undertaken a de novo review to determine whether the admission of the expert testimony was correct; however, the *Gilson* court adopted the abuse of discretion standard set out in *Kumho* and specifically rejected the previous rule of de novo review.[31]

In *Christian v. Gray*, the Oklahoma Supreme Court took the final logical step in the evolution of the law of expert witnesses in Oklahoma. The formal adoption of the *Daubert* and *Kumho* doctrine was expected, but the right opportunity had apparently not yet presented itself. The court reviewed *Daubert* and its progeny and concluded by holding: "Nothing in *Daubert* or *Kumho* conflicts with our Evidence Code. Our Court of Criminal Appeals has already adopted *Daubert* for criminal proceedings in Oklahoma Courts. Today we likewise adopt *Daubert* and *Kumho* as appropriate standards for Oklahoma trial courts in deciding the admissibility of expert testimony in civil matters."[32]

In *Christian*, the "[p]laintiffs alleged that they were injured by airborne chemicals that they inhaled while attending a circus" performance.[33] The central question presented in the case was one of causation.[34] The court observed that "[w]hen an injury is of a nature requiring a skilled and professional person to determine cause and the extent thereof, the scientific question presented must necessarily be determined by testimony of skilled and professional persons."[35] The "[d]efendants filed a motion *in limine* to exclude the testimony of [p]laintiffs' expert witness on the issue of . . . causation."[36] Relying on

29. Gilson v. State, 2000 OK CR 14, ¶ 64, 8 P.3d 883, 907 (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 147 (1999)).
30. *Id.*
31. *See id.* ¶ 68 n.5.
32. Christian v. Gray, 2003 OK 10, ¶ 14, 65 P.3d 591, 600.
33. *Id.* ¶ 4.
34. *Id.* ¶ 54.
35. *Id.* ¶ 20.
36. *Id.* ¶ 2.

Daubert and *Kumho*, the "trial court granted the motion, and stated that the expert was not competent to give a medical opinion on the cause of [p]laintiffs' injuries."[37] The Oklahoma Supreme Court viewed the issues presented as whether *Daubert* applies in Oklahoma, and if it does, whether it was correctly applied by the trial court.[38] The court undertook an extensive discussion of *Daubert* and its evolution. Then, after holding that *Daubert* and *Kumho* will apply in Oklahoma, the court discussed the requirements of proof of causation in a case alleging exposure to a toxin.[39] The discussion of causation is beyond the scope of this Article in that it is unique to particular types of cases. However, the court concluded its causation discussion as follows:

> In summary on the issue of causation, assuming that the expert's method for his conclusions is novel and reliability cannot be taken for granted, we hold that if expert testimony is necessary to show cause of an injury from exposure to a toxin, the testimony of the expert should reveal a reliable method for determining the quantity of the toxin necessary to cause injuries of the type experienced by plaintiff (general causation), unless plaintiff can show that the circumstances are such that general causation should not be necessary. Further, the expert's conclusion must be analytically appropriate for the expert's method.[40]

The court then moved on to a discussion of the standard of review that would be applied. The court observed that the Tenth Circuit has applied a bifurcated standard of review in *Daubert–Kumho* rulings.[41] In the Tenth Circuit, the trial court has the discretion of deciding *how* to apply the *Daubert–Kumho* analysis, but not *whether* to do so.[42] Furthermore, according to the Tenth Circuit, the trial court's ruling on the admissibility of the expert's opinion is reviewed on an abuse of discretion standard.[43] The Oklahoma Supreme Court, however, appears

37. *Id.*
38. *Id.* ¶ 4.
39. *See id.* ¶¶ 35–37.
40. *Id.* ¶ 38 (internal citation omitted).
41. *See id.* ¶ 48.
42. *See* United States v. Velarde, 214 F.3d 1204, 1208–09 (10th Cir. 2000).
43. *See, e.g.*, Hollander v. Sandoz Pharm. Corp., 289 F.3d 1193, 1204 (10th Cir. 2002); United States v. Turner, 285 F.3d 909, 912 (10th Cir. 2002).

not to be so deferential to the trial courts.

> In sum, an expert opinion may be not supported by sufficient facts for legal validation because of at least one of two reasons, (1) It is without, or not based upon, facts necessary for the method or technique used by the expert, or (2) The facts do not support the conclusion of the expert. The abuse of discretion standard applies when reviewing both reasons, and that standard requires us to determine whether a trial court is determining a fact or an issue of law. Once we identify whether fact or law has been adjudicated by the trial court, we then must determine if a deferential or a non-deferential *de novo* review applies to the particular adjudication of fact, and to an issue of law we apply a non-deferential *de novo* standard.[44]

The court viewed the trial court's ruling in *Christian* not as one of admissibility or inadmissibility of an expert's opinion but as one finding an absence of proof of causation. In this regard the court stated:

> Here the trial court listed several facts that the expert did not know, and then concluded that the expert did not show causation, and that his testimony was thus inadmissible. The conclusion of the trial court, although not expressly stated as such, was a legal determination—a conclusion that the facts were insufficient to show cause in fact to a reasonable person. This concept is not new. Trial courts frequently determine causation issues in the context of motions for directed verdicts, and we review those using a *de novo* standard.[45]

The court concluded by holding that the "trial court did not determine that the methods of [p]laintiffs' expert were insufficient [under] one of the particular *Daubert* factors, or some other factor determined to be appropriate in applying *Daubert*."[46] The court held, instead, that the "trial court challenged the expert's conclusion, but did not specifically link [the] deficient conclusion with either a faulty

44. *Christian*, 2003 OK 10, ¶ 51.
45. *Id.* ¶ 50.
46. *Id.* ¶ 54.

method or an exercise of *ipse dixit*[47] by the expert."[48] The court, therefore, issued a writ of prohibition barring the enforcement of the trial court's order excluding the expert's causation testimony.[49] The court did not, however, "determine that the testimony of [p]laintiffs' witness satisfie[d] *Daubert*."[50] "[T]he issue of the admissibility of [p]laintiffs' expert [testimony was] left open for further proceedings in the trial court" where the parties would "litigate the admissibility . . . based upon the *Daubert* criteria . . . explained [t]herein."[51]

III. APPLICATION OF *DAUBERT* AND *CHRISTIAN* BY OKLAHOMA COURTS

One of the first questions presented by the Oklahoma appellate courts after the adoption of *Daubert* through *Christian* was whether the *Daubert* standard would be applied retroactively. In *Twyman v. GHK Corp.*,[52] the Oklahoma Court of Civil Appeals addressed that issue. *Twyman* involved an action by a dairy farmer who alleged that oil and gas activities by the defendants had contaminated his land causing damage to his dairy herd and the land itself.[53] The *Twyman* case was tried in 2002, "before *Christian* adopted *Daubert* for use in Oklahoma civil actions."[54] The threshold question in *Twyman* was whether *Daubert* was applicable to the proffered expert's testimony.[55] The defendants argued for the applicability of *Daubert* at all stages of the trial court proceedings even though *Christian* had not yet been decided.[56] The plaintiffs, on the other hand, argued for the application of the *Frye* standard.[57] The trial court did not specify which standard it was applying in ruling on the admissibility of the plaintiffs' experts. The Court of Civil Appeals held that the *Daubert* standard should be applied retroactively and did not "believe [any] inequities [would] result from retroactive

47. "He himself said it; a bare assertion resting on the authority of an individual." BLACK'S LAW DICTIONARY 743 (5th ed. 1979).
48. *Christian*, 2003 OK 10, ¶ 54.
49. *Id.*
50. *Id.*
51. *Id.* ¶ 55.
52. Twyman v. GHK Corp., 2004 OK CIV APP 53, 93 P.3d 51.
53. *Id.* ¶ 3.
54. *Id.* ¶ 8.
55. *Id.*
56. *See id.* ¶ 7.
57. *See id.* ¶ 8.

application" in the specific case.[58]

Having found that *Daubert* was applicable, the court then turned to the question of whether the plaintiffs' proffered expert met the *Daubert* standard. After stressing that the *Daubert* factors of admissibility are, as noted in *Christian*, flexible and focused on an opinion's relevance and reliability,[59] the court held that the evidence being proffered by the plaintiffs' expert witness "did not meet the *Daubert* reliability standards."[60] Without that expert's testimony, the plaintiffs had failed to "establish the requisite causal nexus between" the actions of the oil companies and the damage to their dairy herd.[61] The result was that an initial jury verdict of $7.25 million, which was subsequently remitted to $950,000 by the trial court,[62] was reversed, and the trial court was directed to enter a judgment in favor of the defendants.[63]

Since *Christian*, Oklahoma courts have applied the *Daubert* analysis to a wide variety of proffered expert testimony. In *Frasier, Frasier & Hickman, L.L.P. v. Flynn*,[64] the *Daubert* analysis was applied to the testimony of a lawyer who had been offered as an expert in a dispute between a law firm and two former partners for breach of a partnership agreement. The lawyer was called to testify as an expert regarding damages and the respective amount of work performed by the parties both before and after the former partners left the partnership.[65] The Oklahoma Court of Civil Appeals noted the application of *Christian* and *Daubert* to the expert's proffered testimony and, as in *Twyman*, emphasized that the standards set forth therein are flexible.[66] The court then observed that the "witness was the President–Elect of the Oklahoma Trial Lawyers Association," and it discussed the witness's extensive background in disputes such as the one between the law firm and the prior partners.[67] The court concluded, after applying the *Daubert* factors, that there was nothing in the lawyer's methodology or background to

58. *Id.* ¶¶ 8, 18.
59. *Id.* ¶ 24.
60. *Id.* ¶ 51.
61. *Id.*
62. *Id.* ¶ 6.
63. *Id.* ¶ 52.
64. Frasier, Frasier & Hickman, L.L.P. v. Flynn, 2005 OK CIV APP 33, 114 P.3d 1095.
65. *Id.* ¶ 11.
66. *Id.* ¶ 22.
67. *See id.* ¶ 24.

consider his testimony inadmissible.[68] The court held that it was ultimately the fact finder's responsibility to decide what weight would be given to the expert lawyer's methodologies.[69]

In *Worsham v. Nix*,[70] the court applied *Daubert*'s flexible factors in a legal malpractice action. In this case, a widow alleged that the lawyers had neglected her husband's lawsuit and made various misrepresentations to her husband to the extent that it drove him to suicide.[71] The plaintiff had offered the testimony of a human resources expert to testify about how a company would react to a workplace harassment or hostile work environment claim.[72] The plaintiff's expert had a Ph.D. in consumer resource studies and was presented as a specialist on how human resource departments in large organizations respond "when they are threatened with suit by an attorney or when suit is filed against" them.[73] His testimony was offered to establish the "but for" requirement of the legal malpractice action; namely, that but for the lawyer's alleged deficient actions, certain things would not have occurred.[74]

The court observed that while the plaintiff's expert was not testifying as a "scientific expert," the trial court, nevertheless, had a "gatekeeping role" to play in determining the admissibility of the proffered expert's testimony.[75] In *Worsham*, the trial court had conducted an evidentiary hearing just before the trial was scheduled to begin.[76] At that hearing, the expert was questioned about the basis for his opinions and conclusions.[77] The appellant argued that the trial court had rigidly applied *Daubert*'s four factors to the expert's testimony.[78] The Oklahoma Supreme Court rejected this argument and held that the trial court had excluded the testimony as "speculative and unreliable," and "not based upon sufficient intellectual rigor" that would otherwise satisfy the *Daubert* test.[79] The Oklahoma Supreme Court concluded that the trial court's exclusion of

68. *Id.* ¶ 27.
69. *Id.*
70. Worsham v. Nix, 2006 OK 67, 145 P.3d 1055.
71. *Id.* ¶ 13.
72. *Id.* ¶ 41.
73. *Id.* ¶¶ 40–41.
74. *Id.* ¶ 32.
75. *Id.* ¶ 37.
76. *Id.* ¶ 38.
77. *Id.*
78. *Id.* ¶ 35.
79. *Id.* ¶ 38.

plaintiff's expert testimony as unreliable was not an abuse of discretion.[80] The court then stated that without that testimony, there was no evidence that "any act or omission" by the defendants could be fairly held "to have proximately caused any pre-suicide emotional distress suffered" by the decedent; summary judgment in favor of the law firm was affirmed.[81]

In *State ex rel. Department of Transportation v. Teal*,[82] the Oklahoma Court of Civil Appeals applied *Daubert* to expert testimony in an eminent domain case. Although this case was dismissed on procedural grounds, the opinion demonstrates the broad applicability of *Daubert*. In *Teal*, the "'expert appraisal witness'" was going to testify regarding damages suffered by the defendants "as a result of their 'loss of use of pre-existing highway right-of-way for access and parking.'"[83] The Oklahoma Department of Transportation argued that the "expert opinion was unreliable . . . because it [was] based on faulty evidence."[84] The trial court ruled on a motion in limine that the expert witness's testimony was unreliable because he could not explain to the court how much of his damage assessment related to the loss of access to the building or the curb.[85] Certainly a real estate appraiser is not testifying about "novel" scientific evidence, yet the court in *Teal* applied *Daubert* to the proffered testimony.

A particular area in which there has been broad application of the *Daubert* rule since *Christian* adopted it for Oklahoma civil cases is in the area of workers' compensation. In *Scruggs v. Edwards*,[86] Justice Edmondson identified the issue presented in the case: "The *sole* issue in the case is whether U.S. Supreme Court opinions [*Daubert*] and [*Kumho*] apply to an Oklahoma workers' compensation claim that is based upon an injury which occurred prior to July 1, 2005 . . . ."[87]

Timing was of import because an ancillary issue was the applicability of an amendment to the workers' compensation statutes effective in 2005[88] requiring the application of "Federal Rule of Evidence 702 and all U.S. Supreme Court case law applicable thereto" in

80. *Id.* ¶ 43.
81. *Id.* ¶¶ 47–48.
82. State *ex rel.* Dep't of Transp. v. Teal, 2010 OK CIV APP 64, 238 P.3d 947.
83. *Id.* ¶ 3.
84. *Id.*
85. *Id.* ¶ 6.
86. Scruggs v. Edwards, 2007 OK 6, 154 P.3d 1257.
87. *Id.* ¶ 1 (citations omitted).
88. *See* OKLA. STAT. tit. 85, § 17 (repealed 2011).

workers' compensation cases.[89] The issue presented for consideration was the retroactivity of that statutory amendment and "whether the amended statutes represent[ed] more than a mere procedural reform and [also] intrude[d] upon substantive rights, specifically, the substantive rights of those claimants challenging the application of *Daubert*" in workers' compensation cases.[90] The court concluded that applying *Daubert* to workers' compensation claims existing before the statutory amendment "made no substantive change in the law."[91] The court implied that *Daubert* and *Kumho* would be applied to all expert testimony presented in workers' compensation court.[92]

Since *Scruggs*, two Oklahoma Court of Civil Appeals cases have dealt with the applicability of *Daubert* in workers' compensation court.[93] In the first of these cases, *Howard v. ACI Distribution South*, the court set forth a clear and concise explanation of how expert testimony is to be considered:

> The evaluation of expert opinion evidence involves four considerations. First, is the witness "qualified as an expert by knowledge, skill, experience, training or education." Second, will the expert's opinion "assist the trier of fact to understand the evidence or determine a fact in issue," that is, is it relevant. Third, even if relevant, should the expert's opinion be excluded on "hearsay or other legal grounds." Fourth, does the expert's opinion pass the test announced in *Daubert* . . . .[94]

As can be seen, Judge Fischer's analysis points out that the *Daubert* analysis is only part of a larger scheme for evaluation of expert testimony. The expert must be qualified, the expert testimony must assist the trier of fact, and the expert testimony must be relevant and not based on hearsay or other objectionable grounds. Then, only if the expert's testimony has passed those three hurdles, does the court apply the test set out in *Daubert* and *Kumho* and adopted in *Christian*. Judge Fischer's

89. *Id.* § 3(17) (repealed 2010).
90. *Scruggs*, 2007 OK 6, ¶ 8.
91. *Id.* ¶ 22.
92. *See id.*
93. *See* Howard v. ACI Distribution S., 2009 OK CIV APP 95, 229 P.3d 565; Adecco Inc. v. Dollar, 2011 OK CIV APP 43, 254 P.3d 729.
94. *Howard*, 2009 OK CIV APP 95, ¶ 14 (citations omitted) (quoting OKLA. STAT. tit. 12, § 2702 (OSCN through 2012 Leg. Sess.); *Scruggs*, 2007 OK 6, ¶ 15).

analysis in *Howard* succinctly summarizes the procedures that all trial courts should follow in evaluating expert testimony in all cases.

IV. THE FALLACY OF THE SO-CALLED NON-NOVEL EXCEPTION TO THE *DAUBERT* RULE

A series of cases have carved out an exception to the *Daubert* inquiry requirement for situations where the expert testimony is deemed to be "not novel" or the expert's methods can be taken for granted. This exception was first applied in Oklahoma by the Oklahoma Court of Criminal Appeals in *Taylor v. State*.[95] In *Taylor*, the court adopted *Daubert* for the first time, and in its adoption the court referred to the admission of "novel" scientific evidence.[96] In fact, the court used the term "novel" thirty-six times throughout the body of the opinion. The opinion, however, does not say that *Daubert* is inapplicable to "non-novel" expert testimony. After *Kumho* extended *Daubert* to all expert testimony, not just scientific evidence, the Oklahoma Court of Criminal Appeals held in *Harris v. State* that *Kumho* would also be applied in Oklahoma, stating:

> Recently, in *Kumho Tire Co. v. Carmichael* the United States Supreme Court explained that the *Daubert* analysis is not limited to "scientific evidence" but shall also be applied to all novel expert testimony introduced pursuant to Rules 702 and 703 of the Federal Rules of Evidence. The *Kumho* analysis is compelling and is a logical and proper extension of the Daubert decision. However, in this case, the "scientific, technical or other specialized knowledge" involved was not novel and has long been recognized as the proper subject of expert testimony.[97]

The Oklahoma Supreme Court in *Christian* noted this exception, stating:

> The Court stated that a federal trial judge possesses the authority "needed both *to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is*

95. Taylor v. State, 1995 OK CR 10, 889 P.2d 319.
96. *See id.* at 327.
97. Harris v. State, 2000 OK CR 20, ¶ 9, 13 P.3d 489, 493 (citation omitted).

> *properly taken for granted*, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises." We agree with the Court of Criminal Appeals that a *Daubert* inquiry will be limited to circumstances where the reliability of an expert's method cannot be taken for granted. Thus, a *Daubert* challenge includes an initial determination of whether the expert's method is one where reliability may be taken for granted.[98]

The problem is that *Kumho* never references a "non-novel" exception to the *Daubert* rule. In fact the word "novel" never appears in the *Kumho* opinion. What the U.S. Supreme Court actually said in *Kumho* is:

> To say this is not to deny the importance of *Daubert*'s gatekeeping requirement. The objective of that requirement is to ensure the reliability and relevancy of expert testimony. It is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field. Nor do we deny that, as stated in *Daubert*, the particular questions that it mentioned will often be appropriate for use in determining the reliability of challenged expert testimony. Rather, we conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable. That is to say, a trial court should consider the specific factors identified in *Daubert* where they are reasonable measures of the reliability of expert testimony.
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> . . . .
>
> The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether* that expert's

98. Christian v. Gray, 2003 OK 10, ¶ 11, 65 P.3d 591, 599–600 (footnote omitted) (citation omitted).

relevant testimony is reliable.[99]

Note that the Court never says that the trial court has the discretion of *whether* to apply *Daubert*, just "*how* to test an expert's reliability."[100]

Two Oklahoma Court of Civil Appeals opinions have applied this non-novel exception to the *Daubert* rule to conclude that a *Daubert* analysis was not required for particular expert testimony. The cases make it clear that this is not just a semantic error. In *Cline v. DaimlerChrysler Co.* the plaintiff offered expert testimony regarding the cause of damage to an engine and transmission in a truck.[101] The truck owner brought a breach of warranty action against the manufacturer for denying warranty coverage of the engine.[102] The truck manufacturer defended on the theory that the warranty was not applicable because the engine had been damaged due to neglect or mishandling.[103] The plaintiff offered the testimony of an expert witness, "a diesel mechanic for forty years," to show the ways that the type of damage to plaintiff's engine could have occurred.[104] DaimlerChrysler, the manufacturer, objected to the testimony on the basis that it failed to satisfy the *Daubert* standards.[105] In one short paragraph, the court concluded that "a *Daubert* inquiry is limited to circumstances where the expert's evidence is novel or where the reliability of an expert's method cannot be taken for granted."[106] The court then quickly held with only one sentence that there was no evidence that the witness's testimony was novel or that the "examination methods and opinions were extraordinary."[107] The court concluded that "*Daubert* does not apply here."[108]

A different division of the Oklahoma Court of Civil Appeals reached a similar result in *Estate of King v. Wagoner County Board of County Commissioners*.[109] That case was a wrongful death action brought against

99. Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999).
100. *Id.*
101. *See* Cline v. DaimlerChrysler Co., 2005 OK CIV APP 31, ¶ 27, 114 P.3d 468, 476.
102. *Id.* ¶ 1.
103. *Id.*
104. *Id.* ¶ 27.
105. *Id.*
106. *Id.* ¶ 28.
107. *Id.*
108. *Id.*
109. Estate of King v. Wagoner Cnty. Bd. of Cnty. Comm'rs, 2006 OK CIV APP 118, 146 P.3d 833.

the owner of a communications tower by the estate of the repairman who fell to his death from the tower.[110] The case went to trial and resulted in a jury verdict for the estate.[111] At trial, the plaintiffs offered the testimony of a witness as an expert on tower safety.[112] The witness was the general manager of training for "a manufacturer of fall protection equipment."[113] The witness stated that he was "recognized in his field as an expert in fall protection."[114] When the tower owner raised the issue of admissibility of the witness's testimony at a pretrial hearing, the trial court observed that the witness "was not 'an expert witness that falls within *Daubert*.'"[115] The tower owner claimed in the appeals court that it was misled into believing that the witness was not going to be allowed to testify; at trial the witness was allowed to testify without a *Daubert* hearing being conducted.[116] The Oklahoma Court of Civil Appeals, framing the issue differently, "agree[d] with the trial court's assessment that [the witness's] testimony was not subject to *Daubert*" inquiry, noting that *Daubert* inquiries were "'limited to circumstances where the reliability of an expert's method cannot be taken for granted' or where the expert evidence is novel."[117] Somewhat like the analysis in *Cline*, the court in *King* succinctly concluded that the witness's testimony was neither novel nor his methods extraordinary, and therefore the *Daubert* analysis did not apply.

Thus, Oklahoma seems to have carved out a position that if an expert witness's testimony can be deemed non-novel or his conclusions unextraordinary, the *Daubert* gatekeeping function is somehow eliminated. Several other state courts have adopted this same exception to the *Daubert* rule.[118]

110. *Id.* ¶ 1.
111. *Id.* ¶ 6.
112. *See id.* ¶ 41.
113. *Id.* ¶ 39.
114. *Id.*
115. *Id.* ¶ 43.
116. *Id.*
117. *Id.* (quoting Christian v. Gray, 2003 OK 10, ¶ 11, 65 P.3d 591, 599–600).
118. *See, e.g.*, Gunn Hill Dairy Props., LLC v. L.A. Dep't of Water & Power, 2012 UT App 20, 269 P.3d 980; Jones v. United States, 27 A.3d 1130, 1137 (D.C. Cir. 2011); State v. Moore, 885 P.2d 457 (Mont. 1994), *overruled on other grounds by* State v. Gollehon, 906 P.2d 697 (Mont. 1995); Harris v. Hanson, 2009 MT 13, 349 Mont. 29, 201 P.3d 151, 158; State v. Clark, 2008 MT 419, 347 Mont. 354, 198 P.3d 809; State v. Price, 2007 MT 269, 339 Mont. 399, 171 P.3d 293; State v. Bieber, 2007 MT 262, 339 Mont. 309, 170 P.3d 444; State v. Damon, 2005 MT 218, 328 Mont. 276, 119 P.3d 1194; State v. Bowman, 2004 MT 119, 321 Mont. 176, 89 P.3d 986; State v. Ayers, 2003 MT 114, 315

The "non-novel" exception to *Daubert* appears to have begun the inadvertent expansion of a grammatical choice into substantive law. Before *Kumho*, cases sometimes referred to "novel" scientific evidence to demonstrate how *Daubert* was to be applied.[119] Then when *Kumho* expanded *Daubert* to all expert testimony, whether scientific or based on "other specialized knowledge," the "novel" term creeps into the cases.[120] As we see in the two Oklahoma Court of Civil Appeals cases discussed above, it would be odd indeed to apply the novelty test to experts who are testifying about things learned through the school of hard knocks, like what causes a diesel engine to wear out[121] or what safety training is needed before one climbs a cell phone tower.[122] Certainly, there is nothing particularly novel about those theories. As in those cases, when the novelty test is applied to "other specialized knowledge," often courts find that the testimony is not novel and admit the testimony without *Daubert* analysis. This is a mistake.

Consider the testimony in *Kumho*. There, the plaintiff's expert had a master's degree in mechanical engineering, had worked for ten years at Michelin America, Inc., and had testified as an expert in other tire failure cases.[123] He was not testifying about some novel scientific theory. He was simply testifying that, based on his inspection of the tire and notwithstanding its significant wear, the cause of the blowout was a manufacturing or design defect.[124] The trial court applied the *Daubert* analysis, although acknowledging that the test is flexible, and concluded that the expert's testimony was not sufficiently reliable.[125]

The Eleventh Circuit reversed, concluding that the expert's testimony was not scientific evidence and therefore *Daubert* did not apply.[126] The Eleventh Circuit reasoned that a *Daubert* analysis applies

Mont. 395, 68 P.3d 768; State v. Hocevar, 2000 MT 157, 300 Mont. 167, 7 P.3d 329; Gilkey v. Schweitzer, 1999 MT 188, 295 Mont. 345, 983 P.2d 869; State v. Southern, 1999 MT 94, 294 Mont. 225, 980 P.2d 3; Hulse v. State Dep't of Justice, Motor Vehicle Div., 1998 MT 108, 289 Mont. 1, 961 P.2d 75; Graftenreed v. Seabaugh, 268 S.W.3d 905, 915 (Ark. Ct. App. 2007).

119. *See* Taylor v. State, 1995 OK CR 10, ¶ 14, 889 P.2d 319, 327.

120. *See* Harris v. State, 2000 OK CR 20, ¶ 8, 13 P.3d 489, 492.

121. *See* Cline v. DaimlerChrysler Co., 2005 OK CIV APP 31, ¶ 27, 114 P.3d 468, 476.

122. *See Estate of King*, 2006 OK CIV APP 118, ¶ 40.

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

124. *Id.* at 143.

125. *Id.* at 146.

126. Carmichael v. Samyang Tire, Inc., 131 F.3d 1433, 1434, 1435–36 (11th Cir. 1997), *rev'd sub nom.* Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

only where an expert "relies on the application of scientific principles, rather than on skill- or experience-based observation."[127] It concluded that the expert's testimony, which it viewed as relying on experience, "falls outside the scope of *Daubert* and that the district court erred as a matter of law by applying *Daubert* in this case," and that the case must be remanded for further (non-*Daubert*-type) consideration under Rule 702.[128]

This is the holding the U.S. Supreme Court reversed in *Kumho*. The expert in *Kumho* was not testifying, as were the experts in *Daubert*, about complex scientific tests regarding epidemiological evidence as to whether a particular drug used during pregnancy causes birth defects. The expert in *Kumho* was simply testifying based on his visual inspection of the tire, the so-called "visual-inspection method."[129] Surely, looking at a tire and offering an opinion as to the cause of the tire's failure is not particularly "novel." If, as the non-novel exception to *Daubert* would suggest, the expert's opinion in *Kumho* was non-novel, then the expert's opinion should not have been subjected to the *Daubert* analysis and should have been admitted without pause. Yet that is not how the U.S. Supreme Court ruled. To the contrary, the expert's analysis was subjected to *Daubert* scrutiny, failed, and was excluded. Thus, the fallacy of the non-novel exception to *Daubert* is revealed in its direct contradiction to *Kumho*.

Even though the *Daubert* analysis is intended to be flexible, there is no circumstance in which a trial court's inherent gatekeeper obligation, the job of determining what evidence is or is not admitted, is abrogated. While the rigors of a full *Daubert* hearing might not be called for in connection with every proffered expert's testimony, some portion of that *Daubert* analysis must be applied. As Judge Fischer noted in *Howard v. ACI Distribution South*, the *Daubert* analysis is only the last of four steps that must be considered when evaluating the admissibility of expert testimony.[130] In every case, the trial court must determine whether something in the expert's background, skill, knowledge, or experience qualifies him or her as an expert. The trial court must evaluate whether the expert's proffered testimony "will assist the trier of fact to understand" the evidence or to determine an issue, and the trial court

127. *Id.* at 1435–36.
128. *Id.* at 1436.
129. *Kumho*, 526 U.S. at 146.
130. Howard v. ACI Distribution S., 2009 OK CIV APP 95, ¶ 14, 229 P.3d 565, 569.

must also determine whether the expert's testimony is relevant or should be excluded on other evidentiary grounds.[131]

The abrogation of *Daubert* through "non-novel" expert testimony has troubled at least one jurist, Justice James C. Nelson of the Montana Supreme Court. In a series of cases in Montana, a state that has similarly adopted the non-novel exception to the *Daubert* rule,[132] Justice Nelson has referred to the non-novel exception to the *Daubert* rule as "unfortunate."[133] Justice Nelson suggests that Montana has "essentially done away with the *Daubert* standards by limiting the requirements" of a *Daubert* inquiry by restricting the court's "gatekeeping obligation to [all] proffered expert testimony *of 'novel' scientific evidence* only."[134] Justice Nelson describes the error of Montana's ways as follows: "In doing so, we have committed an error of logic. The proposition that 'A implies B' is not the equivalent of 'non-A implies non-B,' and neither proposition follows logically from the other. The process of inferring one from the other is known as the fallacy of 'denying the antecedent.'"[135]

Justice Nelson suggests that in doing so, Montana has "turned the *Daubert* approach on its head, unreasonably constraining, in the process, the trial judge's gatekeeping function" and has essentially rejected *Kumho* by "pav[ing] the way for the admission of 'scientific' evidence whose reliability and methodology have never been subject to any level of intellectual rigor."[136]

Similarly, the Supreme Court of New Mexico in *State v. Torres*[137] criticized the "non-novel" exception to *Daubert*. The court noted that while other courts have treated novelty as a "threshold requirement" that precedes the need for a *Daubert* analysis, the "better view" is that *Daubert* "is not limited to novel scientific theories."[138] The court reasoned that novelty is not a threshold question but a factor to be

131. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 590–92 (1993); *see Howard*, 2009 OK CIV APP 95, ¶ 14.

132. *See* State v. Moore, 885 P.2d 457 (Mont. 1994), *overruled on other grounds by* State v. Gollehon, 906 P.2d 697 (Mont. 1995).

133. *See* State v. Clifford, 2005 MT 219, ¶ 66, 328 Mont. 300, 317, 121 P.3d 489, 501 (Nelson, J., concurring).

134. *Id.*

135. *Id.* ¶ 67 (quoting Crouse-Hinds Co. v. Internorth, Inc. 634 F.2d 690, 702 n.20 (2d Cir. 1980)).

136. *Id.* ¶ 68.

137. State v. Torres, 1999-NMSC-010, 127 N.M. 20, 976 P.2d 20.

138. *Id.* ¶ 29.

considered in applying the *Daubert* requirements.[139]

The proper analysis to be followed in all expert witness cases, whether novel, non-novel, or ones that are presumably subject to be taken for granted, is the process outlined by Judge Fischer in the *Howard* case.[140] Regardless of how simplistic and obvious the expert's testimony might be, it must still be put through the process outlined by Judge Fischer. Juries believe experts; they get to do things that lay witnesses do not get to do, namely, give opinions. Thus, even if their testimony seems routine, it should be admitted only after the proper process of evaluation has been employed.

V. PROCEDURAL REQUIREMENTS

Now that Oklahoma has applied *Daubert* in a variety of cases, both civil and criminal, some discussion is warranted regarding procedural steps to be used to ensure preservation of error for appellate review of the admissibility of expert testimony. In *Covel v. Rodriguez*[141] the Oklahoma Supreme Court specifically dealt with the question of how to preserve the issue of admissibility of expert testimony for appellate review. *Covel* was a wrongful death action involving a bus accident on I-35.[142] The question presented was whether the bus brakes were defective such that the driver was unable to stop in time to avoid a head-on collision.[143] At trial, the plaintiffs offered expert testimony regarding the condition of the brakes.[144] This testimony was critical to the causation element of the plaintiffs' claim. The defendants did not object to the plaintiffs' expert's testimony or conclusion at the time of trial but attempted to raise the issue post-trial by challenging the sufficiency of the plaintiffs' evidence to support the verdict that was rendered by the jury.[145] The plaintiffs contended that the defendants waived any objections to the expert's testimony by failing to timely object.[146] The defendants attempted to recouch the issue as not objecting to the

139. *Id.*
140. *See* Howard v. ACI Distribution S., 2009 OK CIV APP 95, ¶ 14, 229 P.3d 565, 569.
141. Covel v. Rodriguez, 2012 OK 5, 272 P.3d 705.
142. *Id.* ¶ 1.
143. *See id.*
144. *See id.*
145. *See id.*
146. *Id.* ¶ 2.

admissibility of the expert's evidence, arguing instead that the plaintiffs' evidence was insufficient as a matter of law, and therefore, the causation element had not been proved.[147]

The Oklahoma Supreme Court held that the expert's evidence was properly subject to scrutiny under *Daubert* and *Kumho*.[148] The defendants' problem in the case, however, was that they "first raised the *Daubert* arguments in their motion for directed verdict after all the evidence was in."[149] They "did not object *in limine* or contemporaneously" with the expert's opinion being offered.[150] The Oklahoma Supreme Court, following precedent from the Tenth Circuit,[151] held that failure to timely object to the expert's testimony at trial forfeits any ability to subject the expert's testimony to a *Daubert* challenge after closing of the evidence.[152] The Oklahoma Supreme Court concluded that allowing a party to "raise *Daubert* objections . . . in the guise of an insufficiency-of-the-evidence argument" would "deprive[] the expert of the opportunity to offer other supporting proof" for his conclusions or supplement his arguments.[153] The court observed that *Daubert* "does not enable a party to allow the expert's testimony to be admitted and then attempt to discredit that testimony on *Daubert* grounds after all the evidence is in. By failing to object, the error is waived on appeal, in the absence of fundamental error."[154]

VI. CONCLUSION

The Oklahoma Supreme Court has now clearly applied *Daubert* and *Kumho* to all civil cases in Oklahoma. Similarly, the Oklahoma Court of Criminal Appeals says that *Daubert* and *Kumho* are applicable in criminal cases. The practitioner is well reminded that a timely objection to proffered expert testimony is required in order to preserve the issue for appellate review. The Oklahoma Supreme Court will not allow a party to recouch a *Daubert* challenge into an insufficiency-of-the-evidence challenge if a timely objection was not made at trial. Finally, the

147. *Id.* ¶ 3.
148. *Id.* ¶ 4.
149. *Id.* ¶ 5.
150. *Id.*
151. *Id.* ¶ 6; *see* Macsenti v. Becker, 237 F.3d 1223 (10th Cir. 2001).
152. *Covel*, 2012 OK 5, ¶ 9.
153. *Id.*
154. *Id.*

practitioner is advised to take with a grain of salt and proceed with caution under the so-called "non-novel" exception to the *Daubert* rule. That exception does not appear to be on firm footing, although certainly a full *Daubert* hearing with battling experts is not required in connection with every proffered expert's testimony. The courts have made it clear that the *Daubert* analysis is intended to be flexible and that the factors are not controlling. But that does not mean, and should not be construed, as allowing the factors to be ignored. The process outlined in *Howard v. ACI Distribution South*[155] is the better procedure. That process ensures that the gatekeeping function required of trial courts is fulfilled and that expert testimony, regardless of how non-novel and ordinary, is only admitted after proper trial court scrutiny.

155. Howard v. ACI Distribution S., 2009 OK CIV APP 95, ¶ 14, 229 P.3d 565, 569.