INTERPRETING NEBRASKA RULE OF EVIDENCE 702 AFTER THE NEBRASKA SUPREME COURT ADOPTED THE FEDERAL DAUBERT STANDARD FOR THE ADMISSIBILITY OF EXPERT TESTIMONY IN SCHAFERSMAN v. AGLAND COOP

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INTRODUCTION

Any rational judicial system should serve the twin goals of truth and justice. Both the Federal and the Nebraska Rules of Evidence adopt these goals as the purposes underlying each and every rule of evidence. The evidentiary rules dealing with witnesses are no exception. Rule 602 of both the Federal and Nebraska Rules of Evidence bars the testimony of all non-expert witnesses unless foundational evidence has been introduced "sufficient to support a finding that the witness has personal knowledge of the matter." Similarly, Rule 701 excludes the opinions of lay witnesses unless such opinions "are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." These rules assume that truth and justice are best served if the testimony of all lay witnesses is filtered through the foundational requirement of personal knowledge. The trial judge's role in administering this "personal knowledge" filter is minimal. If there is evidence "sufficient to support a finding that the witness has personal knowledge," then the judge must admit the evidence and instruct the jury that they must decide whether the witness in fact has personal knowledge of the subject matter of his or her testimony.

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1. See Fed. R. Evid. 102; Neb. Rev. Stat. § 27-102 (1995). Both Rules provide: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined."


4. See, e.g., United States v. Hickey, 917 F.2d 901, 904 (6th Cir. 1990) ("Testimony should not be excluded for lack of personal knowledge unless no reasonable juror could believe that the witness had the ability and opportunity to perceive the event that he testifies about").
Rule 703 excepts expert witnesses from the foundational requirement of personal knowledge. Under Rule 703 an expert may testify on the basis of (1) personal knowledge, (2) hypothetical questions based upon assumptions that are reasonably supportable by the evidence of the case, (3) facts made known to the expert during the trial and (4) facts or data made known to the expert from any other sources “[i]f of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.”

Given the breadth of the sources from which expert witnesses may testify, the norms of truth and justice demand that alternative foundational requirements serve as a filter for unreliable expert testimony. A reliability filter for expert testimony is especially important both because expert testimony may be outcome determinative in many cases and jurors may have little experience evaluating such testimony.

Under the Federal and Nebraska Rules of Evidence, the filter comes by way of Rule 702. Rule 702 requires that the proponent of expert testimony establish that the expert’s testimony “will assist the trier of fact to understand the evidence or to determine a fact in issue . . .” However, the language of Rule 702 neither delineates those circumstances where an expert’s testimony will assist the trier of fact, nor the level of proof necessary for admissibility. Should the court determine the preliminary issue of reliability at a Rule 104(b) conditional relevancy level, giving the issue to the jury if there is evidence “sufficient to support a finding” of reliability? Alternatively, should the issue of reliability of expert testimony be considered a Rule 104(1) preliminary issue for the court? These related issues, the content of the reliability tests for experts and the respective responsibilities of judge and jury in making these determinations have been two of the most controversial evidentiary issues facing both federal and state courts. In recent years, both federal and state courts have moved away from the Frye standard of general acceptability in the scientific community, toward a more complex standard for determining reliability. In the federal courts, the change came in 1993 with the Supreme Court’s decision in Daubert v. Merrell Dow Pharmaceuticals, Inc. In Nebraska, the change came in 2001 with the Nebraska Supreme Court’s adoption of Daubert in Schafersman v. Agland Coop.

This article seeks to answer the question “what difference does it make that the Nebraska Supreme Court adopted the federal Daubert standard for the admissibility of expert testimony in Schafersman?”

In answering this question, this article reviews Nebraska Rule of Evidence 702 from the perspectives of (1) statement of the rule, (2) legislative history, (3) foundational steps in introducing expert testimony under Daubert, and (4) the analytical development of Nebraska's expert evidence rule from Nebraska's earlier Frye to the present Daubert standard. This review of Nebraska Rules of Evidence 702 considers the effect of the Court's adoption of Daubert at competency, theory, methodology and conclusion foundational levels. The examination also discusses the effect of Daubert at each stage of the proceedings from discovery, pretrial motions, trial, post-trial motions and on appeal. The article concludes that any attorney who disregards the significance of Schafersman's adoption of Daubert does so at the peril of losing any case where difficult expert issues are important to the outcome of the case.

SECTION 27-702 ("RULE 702"): EXPERT TESTIMONY RULE IN NEBRASKA 702[A] STATEMENT OF THE RULE

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.  

702[B] LEGISLATIVE HISTORY

Nebraska originally adopted verbatim Federal Rule of Evidence 702 in 1975. In comparing prior Nebraska authority with Federal Rule 702, the Supreme Court Committee on Practice and Procedure made three observations. First, "Nebraska decisions in the past have allowed expert opinion to aid the trier of fact when lay intelligence could not adequately handle the subject matter." Second, the prior Nebraska practice of limiting "the fields of knowledge that could be testified to by an expert" is "terminated by this rule." Third, Rule 702 allowing expert testimony in the form of "an opinion 'or otherwise'" expands the Nebraska practice which previously was restricted


12. PROPOSED NEBRASKA RULES, supra note 11, at 109 (citing Kohler v. Ford Motor Co., 187 Neb. 428, 439, 191 N.W.2d 601, 608 (1971) as limiting the field of expert testimony to that "related to some science, profession, business or occupation").
only to opinion testimony. The Committee neither discussed the commonly accepted Frye standard of admissibility for expert testimony, nor the possibility that Rule 702 might affect that standard.

702[C] FOUNDATION

702[C.1] EXPERT TESTIMONY EVIDENCE

There are four levels of foundation relevant to the admissibility of expert testimony evidence: competency, theory, technique, and application.

702[C.1.a] Competency

The witness is qualified by knowledge, skill, experience, training or education to testify regarding an expert theory or principle, a methodology or technique or the application of an expert opinion to relevant facts.

702[C.1.b] Theory (sometimes may be established by judicial notice or prima facie statutory recognition)

1. The witness is qualified by knowledge, skill, experience, training or education to testify regarding a relevant expert theory or principle.

2. The theory or principle is accurate or reliable as determined by the following factors or their reliability equivalence:
   a. Whether the reliability of the theory or principle has been tested.
   b. Whether the reliability of the theory or principle has been the subject of peer reviewed analysis or publication.
   c. Whether the reliability of the theory or principle has an established rate of error.
   d. Whether the reliability of the theory or principle is generally accepted within the relevant scientific community.

13. PROPOSED NEBRASKA RULES, supra note 11, at 109 (citing Nebraska Pattern Jury Instructions, 1.42, 1.43, 14.55 and 14.55A, which, while all dealing with expert testimony, all refer to "opinions"). Under Rule 702, an expert may not only give an opinion, but also may give a "dissertation on or exposition of principles relevant to the case without giving an opinion." Id.

14. The foundation stated herein follows Schafersman's adoption of the federal Daubert standard.

15. The Supreme Court suggested this non-exclusive four-part test in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993) to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." In Joiner v. Gen. Elec. Co., 522 U.S. 136, 146 (1997), the Court held that notwithstanding the potentially out-come determinative nature of a court's Daubert ruling, a court's Daubert determination should be subject to an abuse of discretion standard whether the decision admitted or excluded expert testimony. The Supreme Court in Kumho Tire Co. v. Car-
3. The expert states and explains the theory or principle.
   The expert explains the basis of his or her testimony regarding the principle or theory.

702[C.1.c] General Application of the Principle or Theory to a Technique or Procedure for Applying the Theory or Principle (sometimes may be established by judicial notice or prima facie statutory recognition)

1. The witness is qualified by knowledge, skill, experience, training, or education to testify regarding the validity of the technique or procedure for applying the expert theory or principle.
2. The technique or procedure for applying the theory or principle is valid or reliable as determined by the following factors or their reliability equivalence:
   a. Whether the reliability of the technique or procedure has been tested.
   b. Whether the reliability of the technique or procedure has been the subject of peer reviewed analysis or publication.
   c. Whether the reliability of the technique or procedure has an established rate of error.
   d. Whether the reliability of the technique or procedure is generally accepted within the relevant scientific community.
3. The expert states and explains the technique or procedure.
4. The expert explains the basis of his or her testimony regarding the principle or theory.

702[C.1.d] Specific Application of the Technique or Procedure (may never be established by judicial notice or prima facie statutory recognition)

1. The witness is qualified by knowledge, skill, experience, training, or education to apply the method, theory, technique, or procedure, and interpret the results.
2. The equipment, if any, relied upon in applying the technique or procedure was working properly when used.
3. The sponsoring witness used the properly tested equipment.
4. The sponsoring witness used the equipment properly.

michael, 526 U.S. 137, 137 (1999) held 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." Id. at 142. The Court added: "the test of reliability is 'flexible,' and Daubert's list of specific factors neither necessarily nor exclusively applies to all experts in every case." Id.
5. The sponsoring witness is capable of interpreting and explaining the application of the method, theory or equipment to the facts of the case.

6. The sponsoring witness explains the application of the technique or procedure and any opinions arising therefrom.


1. The witness is qualified by knowledge, skill, experience, training, or education to form a relevant opinion based upon a re-enactment of an event.

2. The event was re-enacted for illustrative purposes.

3. The qualified witness participated in or witnessed the re-enactment of the event.

4. The conditions of the re-enactment are sufficiently similar to the event at issue to make the illustrative re-enactment relevant.

5. The witness testifies regarding the re-enactment and any conclusions to be reasonably drawn from the re-enactment.

702[D] INTERPRETIVE ANALYSIS

702[D.1] STANDARD OF REVIEW

The decision whether to admit or exclude expert testimony is a preliminary issue of fact for the court under Nebraska Rule of Evidence Rule 104(1) and Federal Rule of Evidence 104(a). The Nebraska Supreme Court has repeatedly confirmed that the trial court's admission of expert testimony "is within the trial court's discretion and its ruling will be upheld absent an abuse of discretion." This ruling in Nebraska has been confirmed as the standard in the federal courts by the Untied States Supreme Court.

702[D.2] RULE 702 IN COMPARISON TO NEBRASKA COMMON LAW

Subject to the trial judge's preliminary fact-finding discretion, Nebraska Evidence Rule 702 as interpreted by the Nebraska Supreme Court has expanded Nebraska's common law expert evidence rules with respect to (1) the scope of expert testimony; (2) the breadth of the acceptable bases for qualifying experts; (3) the available forms under which expert testimony may be given; and more recently (4) the foun-

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ADMISSIBILITY OF EXPERT TESTIMONY

ditional guidelines for determining the relevancy and reliability of expert testimony.

First, Rule 702 broadens the scope of expert testimony from a common-law of "beyond lay comprehension" to an "assist the trier of fact" standard. Prior to the enactment of the Nebraska Rules of Evidence, the Nebraska Supreme Court in Kohler v. Ford Motor Co., 18

held that "[t]o warrant the use of expert testimony . . . the subject of the inference must be so distinctively related to some science, profession, business or occupation as to be beyond the ken of the average layman." 19 However, Rule 702's "assist the trier of fact" language contains no such limitation. In determining whether an expert's testimony will assist the trier of fact, a two-part test is applied: (1) Is the expert's testimony framed in the manner in which the jury must decide the issue? (2) Does the jury have all of the information necessary to form its own opinion. 20

Second, Rule 702 expands the breadth of expertise under which witnesses may be qualified. While the Nebraska Supreme Court had previously recognized that "[a]n expert may be qualified by his formal education or practical experience," Rule 702 clarifies and extends the bases for expertise to include "knowledge, skill, experience, training, or education." 21 The Nebraska Supreme Court illustrated the breadth of the expert qualification rules in State v. Briner 22 by recognizing an "expert burglar" as qualified to testify regarding the identification and use of burglary tools. 23

Third, Rule 702, by allowing experts to testify "in the form of an opinion or otherwise," avoids the necessity of experts testifying exclusively in opinion form in response to convoluted hypothetical questions. 24 Under Rule 702, an expert may testify in opinion form with or without the baggage of a hypothetical question; may testify regarding the results of an experiment or the significance of demonstrative evi-

or may simply explain a scientific principle, leaving the application of the facts to another expert witness or the trier of fact. The Nebraska Supreme Court explained in *Shover v. General Motors Corp.* that the expanded form of testimony "includes the use of demonstrative evidence, the conducting of experiments, and the exposition of principles relevant to the issues."

Fourth, while the Nebraska Supreme Court continued to rely on the *Frye* standard for the admissibility of expert testimony for over two decades following the adoption of Rule 702, the Court in *Schafersman v. Agland Coop.*, changed the prior common law rule and adopted the federal *Daubert* standard as the proper standard of admissibility for expert testimony under Rule 702.

**702[D.3] SIGNIFICANT BUT NOT MAGICAL WORDS: TO A REASONABLE DEGREE OF EXPERT CERTAINTY**

Counsel should preface every opinion question of an expert by a prior question regarding the degree of confidence the witness holds the opinion. The preferred form of the prior foundational question is "Do you have an opinion to a reasonable degree of certainty within the field of your expertise?" However, does it really matter whether you use the magic words "reasonable degree of certainty," or are either "reasonable probability" or "reasonable possibility" sufficient?

The Nebraska Supreme Court has denied that any specific "magic words" are necessary, but counsel cannot ignore completely the significance of the degree of certainty question. Reversing the trial court's ruling that the expert's answer "[m]y guess is that . . . ,"

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29. Owen v. Am. Hydraulics, 258 Neb. 881, 889, 606 N.W.2d 470, 477 (2000) ("Although expert medical testimony need not be couched in the magic words 'reasonable medical certainty' or 'reasonable probability,' it must be sufficient as examined in its entirety to establish the crucial link between the plaintiff's injuries and the accident occurring in the course and scope of the worker's employment."); Renne v. Moser, 241 Neb. 623, 637, 490 N.W.2d 193, 202 (1992) (quoting Edmonds v. I.B.P., Inc., 239 Neb. 899, 905, 479 N.W.2d 754, 757 (1992)) (stating "expert's testimony need not be couched in the magic words 'reasonable degree of medical certainty or reasonable probability'"); Lane v. State Farm Mut. Auto. Ins. Co., 209 Neb. 396, 411, 308 N.W.2d 503, 512 (1981) (upholding the admission of a physician's testimony regarding the causal connection between the accident and the injury, even though the physician "did not use the magic words 'reasonable medical certainty'").
vided too speculative a basis for the expert’s opinion, the Court in Renne v. Moser 30 explained that while

an expert’s opinion need not be expressed with “reasonable certainty” within the expert’s field of expertise, but may be expressed with “reasonable probability” or with terminology and meaning similar to “reasonable probability,” the expert’s opinion must be sufficiently definite and relevant to provide a basis for the fact finder’s determination of an issue or question. 31

The Court further observed that the expert’s choice of words, “my guess is that . . .,” taken in context with his entire testimony, should have been taken as the equivalent of stating an opinion with reasonable probability. 32

The Nebraska Supreme Court has specifically held that “‘reasonable certainty’ and ‘reasonable probability’ are one and the same thing.” 33 The Court has also noted that prior to adoption of the Nebraska Rules of Evidence, the Court accepted as adequate qualifiers the alternative terms: “‘probably’ as ‘reasonably; credibly; presumably; in all probability; so far as the evidence shows; and very likely.’” 34 However, while the specific prefatory words to an expert’s opinion are not magical, neither are they insignificant. An expert opinion couched in terms of mere possibility, as compared with probability or certainty, provides an insufficient basis for admitting expert testimony. 35

If counsel believes an expert’s opinion is inadmissible on the basis of an inadequate level of certainty, then counsel should object on com-


32. Renne, 241 Neb. at 628, 490 N.W.2d at 202. See also Frank v. A & L Insulation, 256 Neb. 898, 906, 595 N.W.2d 586, 594 (1999) (holding that an expert’s opinion must be examined in the context of the entire statement to determine whether the opinion has been formed to the necessary level of certainty to be more than a guess or mere conjecture); Doe v. Zedek, 255 Neb. 963, 587 N.W.2d 885 (1999) (stating expert testimony “must be sufficient as examined in its entirety . . .”).

33. Lane, 209 Neb. at 411-12, 308 N.W.2d at 512 (citing Marion v. American Smelting & Refining Co., 192 Neb. 457, 460-61, 222 N.W.2d 366, 368-69 (1974)).

34. Id. at 412, 308 N.W.2d at 512 (quoting Welke v. City of Ainsworth, 179 Neb. 496, 138 N.W.2d 808 (1965)).

35. Neill v. Hemphill, 258 Neb. 949, 957, 607 N.W.2d 500, 505-06 (2000); Zedek, 255 Neb. at 975, 587 N.W.2d at 894 (“[M]edical expert testimony regarding causation based upon possibility or speculation is insufficient; it must be stated as being at least “probable,” in other words, more likely than not.”); Berggren v. Grand Island Accessories, 249 Neb. 789, 797, 545 N.W.2d 727, 734 (1996) (stating medical testimony “cannot be based on possibility or speculation”).
petency or relevancy grounds rather than foundational grounds that the witness has not used the "magic words" of "reasonable degree of certainty." If an expert "does not possess such facts that enable him to express a reasonable, accurate conclusion as distinguished from a mere guess," then the judge should sustain a relevancy objection regardless of the presence or absence of magic words qualifying the expert's opinion.


702[D.4.a] The Federal Standard:


The idea that scientific evidence requires special foundational consideration arose in 1923 in Frye v. United States. In Frye, the trial court excluded the defendant's proffer of early polygraph-type evidence involving a "systolic blood pressure test," on the grounds that the test, which relied upon unfounded scientific evidence, was too speculative to be admissible. Affirming on appeal, the United States Court of Appeals for the District of Columbia Circuit enunciated what became known as the Frye test or standard for the admissibility of novel scientific evidence:

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 particular field in which it belongs.

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37. Menkens v. Finley, 251 Neb. 84, 93-94, 555 N.W.2d 47, 53-54 (1996). But see Lange v. Crouse Cartage Co., 253 Neb. 718, 725-26, 572 N.W.2d 351, 355-56 (1998) (refusing to exclude the expert testimony of a vocational rehabilitation counselor who admitted on cross-examination that he had calculated his opinion of loss of earnings based upon an incorrect hourly rate assumption, because on redirect the expert explained that the error in hourly rate did not change his lost-earning-capacity opinion because he had calculated his opinion on a weekly basis, including overtime, rather than on an hourly basis).

38. 293 F. 1013 (D.C. Cir. 1923).

Although this new standard for admissibility of novel scientific evidence left many questions unanswered, the federal courts and many states adopted the *Frye* standard with little criticism or discussion. If a subject of expert testimony was considered novel or lacked general acceptance by the relevant scientific community, then the opponent could challenge admissibility under the *Frye* standard. Otherwise the reliability of expert testimony remained an issue of weight for the trier of fact, rather than a preliminary issue of admissibility for the court.

702[D.4.b.ii] Adoption of the Federal *Daubert* Standard

When the Federal Rules of Evidence were adopted in 1975, it was unclear whether Rule 702 was intended to codify the *Frye* standard or introduce a different standard for the admissibility of expert testimony. Most federal and state courts continued to follow *Frye* with little discussion, but a split of authority emerged at the federal level suggesting Rule 702 required a different approach. The debate ended in 1993 when the United States Supreme Court decided *Daubert v. Merrell Dow Pharmaceuticals, Inc.*\(^{40}\) The Court unanimously rejected the *Frye* "generally accepted" relevancy standard in favor of a new *Daubert* standard as more properly capturing Rule 702's general relevancy and "reliability" standards.\(^{41}\)

*Daubert* was a products liability lawsuit filed on behalf of two minor children and their parents for serious birth defects, which the plaintiffs claimed were caused by the prenatal ingestion of Bendectin, a prescription drug for "morning sickness" marketed by the defendant.\(^{42}\) The district court granted summary judgment in favor of the defendant on the basis of an affidavit from defendant's well-credentialed expert who expressed an opinion that no scientific proof existed connecting birth defects with prenatal use of Bendectin.\(^{43}\) The district judge rejected the admissibility of contradictory opinions held by plaintiffs' well-credentialed experts who supported their opinions to the contrary by animal studies, chemical structure analyses, and the unpublished "reanalysis" of previously published human statistical studies.\(^{44}\) According to the trial judge, these studies relied upon by plaintiffs' experts did not meet the applicable "general acceptance"

\(^{40}\) 509 U.S. 579 (1993).
\(^{42}\) Daubert, 509 U.S. at 582.
\(^{44}\) Daubert, 727 F. Supp. at 573-75; Daubert, 509 U.S. at 583-84.
standard for the admission of expert testimony. The Ninth Circuit affirmed on the basis of the Frye standard. The Ninth Circuit relied heavily on the fact that other circuits had refused to admit reanalyses of epidemiological studies that had neither been published or subjected to peer review.

The Supreme Court reversed. The Court rejected the Frye "generally accepted" standard on the grounds that neither the text nor legislative history of the Federal Rules of Evidence references such a test. In place of the Frye standard, the Court established the twin test of "reliability" and "relevancy" which the Court stated was built into the Federal Rules of Evidence.

The Court interpreted the "reliability" test as arising from Rule 702's use of the terms "scientific" and "knowledge." The Court also inferred that "[t]he adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation." The Court further explained that "[p]roposed testimony must be supported by appropriate validation—i.e., 'good grounds', based on what is known. In short, the requirement that an expert's testimony pertain to 'scientific knowledge' establishes a standard of evidentiary reliability."

The Court further stated that a "relevancy" standard could also be found in Rule 702. First, Rule 702's requirement that expert testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue," goes primarily to relevance. It "requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility."

As guidelines for the courts administering this enhanced screening role over scientific evidence, the Court offered several "general observations" which have become known as the Daubert standard for determining the relevance and reliability of scientific evidence. Before any expert may offer an opinion dependent upon a scientific principle

45. Daubert, 727 F. Supp. at 572; Daubert, 509 U.S. at 583.
47. Daubert, 951 F.2d at 1130-31.
49. Id. at 588.
50. Id. at 589.
51. Id. (citing Fed. R. Evid. 702).
52. Id. at 590.
53. Id.
54. Id. at 591.
55. Id.
56. Id. at 592.
or methodology, the proponent must lay credible foundation establishing that the theory or methodology (1) has been tested; (2) has been the subject of peer reviewed analysis or publication; (3) has an established rate of error and established methodological protocols; and (4) is generally accepted within the relevant scientific community.\footnote{57}


Armed with the \textit{Daubert} standard, courts began exercising this newly-announced "gate-keeping" responsibility over scientific evidence. Contrary to early speculation spawned by \textit{Daubert}, which suggested that \textit{Frye} may have excluded too much, the courts under \textit{Daubert} excluded more expert testimony not less. Indeed, on remand of the \textit{Daubert} case the Ninth Circuit held that summary judgment had in fact been properly granted even under the newly-minted \textit{Daubert} standard.\footnote{58} Concerned with trial judges increasingly displacing the jury by their \textit{Daubert} rulings, the United States Court of Appeals for the Eleventh Circuit in \textit{Joiner v. General Electric Co.},\footnote{59} applied a "particularly stringent standard of review to the trial judge's exclusion of expert testimony," inviting the Supreme Court's review of the issue.\footnote{60} On appeal, the United States Supreme Court held that notwithstanding the potentially outcome-determinative nature of a court's \textit{Daubert} ruling, a trial judge's \textit{Daubert} determination should be subject to an abuse of discretion standard regardless of whether the decision admitted or excluded expert testimony.\footnote{61}


Following \textit{Joiner}, if a trial court's outcome-determinative decision to exclude expert testimony premised upon a "scientific" foundation was subject to an abuse of discretion standard, the question remained whether the trial court's gate keeping responsibility is limited to "scientific" evidence only, or extends to non-scientific expert testimony as well? Do engineers, physicians, bee-keepers and other experts of every subject imaginable, whether qualified by education, training or experience, all have to run through the \textit{Daubert} gauntlet before they can be heard by the jury? If so, the "gate keeping" responsibility of the

\footnote{57. Id. at 594-95.}
\footnote{58. Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1132 (9th Cir. 1995), cert. denied, 516 U.S. 869 (1995).}
\footnote{59. 78 F.3d 524 (11th Cir. 1996).}
court, backed by an abuse of discretion standard of review, would loom large as an evidentiary barrier for many cases. This unanswered question, raising the reality of a potentially dramatic shift of power between judge and jury in the handling of expert testimony, was addressed by the Supreme Court in *Kumho Tire Co. v. Carmichael.*

In this products liability case arising out of a blown automobile tire, Chief Judge Charles R. Butler Jr., in a pretrial *Daubert* hearing, granted the motions of all defendants both to exclude the testimony of plaintiff's engineering expert and to grant summary judgment. The underlying facts involved a single-vehicle crash of a minivan that occurred when the driver lost control after the right rear tire of the van failed. Plaintiff had purchased the used minivan "as is" with 88,997 miles on it. The right rear tire that failed was a Hercules Superior XII Steel Belted Radial tire that had been designed and manufactured by Kumho & Company and produced in South Korea. Although the tire failed two months and 7,011 miles after plaintiff's purchase of the used minivan, the actual service history of the tire was unknown. What was known was that the original tire depth of 10/32" to 11/32" had been reduced to between 0/32" to 3/32" and a previous tire puncture had not been adequately repaired. The issue in the case was whether the tire had blown as a consequence of tire abuse or some kind of manufacturing or design defect.

To support a theory of product defect, the plaintiffs offered the testimony of one expert witness, Dennis Carlson. In support of Carlson's qualifications to testify regarding tire design and manufacturing defects, plaintiffs offered evidence that Carlson had a master's degree in mechanical engineering. He also had ten years of experience with Michelin America in the field of tire design. Additionally, he was employed by George R. Edwards and Associates as a tire consultant and had previously testified as a tire consultant in another case on tire design defect.

Based upon his education, experience and training, plaintiffs offered Carlson's expert opinion testimony "that the tire failed because of poor or insufficient adhesion between the rubber, steel, and nylon

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65. *Id.* at 1517.
66. *Id.*
67. *Id.*
68. *Id.* at 1518.
69. *Id.*
70. *Id.*
components of the tire."71 According to Carlson's deposition testimony, the insufficient adhesion "caused the tire components to separate from each other, resulting in the flapping of the tread and the sudden, catastrophic loss of air pressure in the tire."72 However, Carlson admitted that the loss of adhesion could have been caused by either misuse or product defect.73 Carlson further testified that the only relevant form of tire abuse would have been "overdeflection, which may occur when a tire is underinflated, overloaded, or both."74 The controversial part of Carlson's testimony involved the manner in which he ruled out abuse by overdeflection as a possible cause of the tire separation.

According to Carlson, in considering whether a tire had been abused by overdeflection an expert would expect to see four signs: "(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."75 Carlson testified that the absence of evidence of at least two of these factors, "rules out overdeflection as a cause of tire failure and, barring other evidence of abuse, [supports the conclusion] that the loss of adhesion was prompted by a manufacturing or design defect."76

In applying these overdeflection tests to the tire at issue and finding insufficient evidence to support a finding of overdeflection, Carlson relied heavily upon the opinion of plaintiff's original expert, George Edward, Carlson's employer who became too ill to testify in the case. Edward had examined the tire at issue and found insufficient evidence to indicate overdeflection. Rather than doing his own tests, Carlson formed an opinion that the tire at issue was defective merely by adopting Edward's findings.77 While Carlson visually inspected the tire for the first time an hour before his deposition, he had formed his opinion regarding the tire defect much earlier. Although he discovered some of the signs he had testified were indicative of overdeflection,78 he concluded that the evidence with respect to each factor was insufficient to demonstrate overdeflection despite the fact

71. Id. at 1519 (citing Carlson Deposition at 411).
72. Id. (citing Carlson Deposition at 331).
73. Id.
74. Id. Carlson testified that "'overdeflection causes the tread of a tire to become too hot, causing deterioration in the sidewall, cords, and rim of the tire.'" Id. at 1519 n. 5 (citations omitted).
75. Id. at 1519 (citing Carlson Deposition at 250-52, 390).
76. Id. (citing Carlson Deposition at 278-79).
77. Id. at 1519 n. 6.
78. Id. at 1519. In his deposition he admitted he observed signs of (1) uneven tread wear, (2) sidewall deterioration, (3) abnormal bead grooving and (4) rim flange impressions. Id. (citing Carlson Deposition, at 403-06, 445-46, 449-56).
that he performed no tests on the tire.\textsuperscript{79} Once he had concluded that there existed a “paucity of evidence of overdeflection or other abuse. . . .” he concluded that the tire must have failed because of a defect despite the absence of any “affirmative evidence of a defect in the tire.”\textsuperscript{80}

The defendants moved for a summary judgment based upon the unreliability of Carlson’s expert testimony under the \textit{Daubert} standard.\textsuperscript{81} In fulfilling his “gatekeeping” responsibility, Chief Judge Butler found foundational testimony lacking on each of \textit{Daubert’s} four factors.\textsuperscript{82} First, Carlson admitted that much of his analysis was “subjective” and that he knew of no tests which could be used to test the results of his visual inspection of the tire at issue.\textsuperscript{83} Second, Carlson conceded that no publications discussed his tire analysis technique.\textsuperscript{84} Third, Carlson admitted that his testimony depended upon his experience at assessing tires and that his accuracy rate in distinguishing between overdeflected and defective tire separation had never been tested to determine a potential rate of error.\textsuperscript{85} Finally, the only evidence relevant to the issue of whether his tire analysis methodology is generally accepted in the relevant scientific community was his own testimony that other experts have followed similar methodology for distinguishing between abused tires and defective tires.\textsuperscript{86}

Responding to the absence of the four \textit{Daubert} factors for determining the admissibility of scientific evidence, the plaintiff argued that Carlson’s testimony was “technical analysis,” rather than scientific evidence, and therefore, was exempted from the \textit{Daubert} factors.\textsuperscript{87} However, Chief Judge Butler observed to the contrary that federal courts have routinely applied \textit{Daubert} to cases involving “technical” as well as those solely concerned with “scientific” analyses.\textsuperscript{88} Chief Judge Butler concluded that because Carlson’s testimony failed to satisfy the foundational steps outlined in \textit{Daubert}, “Carlson’s testimony is simply too unreliable, too speculative, and too attenuated to the scientific knowledge on which it is based to be of material assis-

\textsuperscript{79} Id. (citing Carlson deposition at 403-06, 445-46, 449-56).
\textsuperscript{80} Id.
\textsuperscript{81} Id. at 1520. The defendants also moved for summary judgment because of the absence of any affirmative proof of a tire defect. \textit{Id.} However, the court rejected this ground for summary judgment, perceiving “no inherent flaw in a process-of-elimination form of proof per se, as long as the underlying methodology is scientifically valid.” \textit{Id.} at 1520, n. 7.
\textsuperscript{82} Id. at 1519-20 (citing \textit{Daubert}, 509 U.S. at 589-95).
\textsuperscript{83} Id. at 1520-21 (citing Carlson Deposition at 276-84, 295-96, 302, 387-88).
\textsuperscript{84} Id. at 1521 & n. 10 (citing Carlson Deposition at 303).
\textsuperscript{85} Id. at 1521 (citing Deposition at 281-84, 311, 474-75).
\textsuperscript{86} Id. at 1521 & n. 11 (citing Carlson Deposition at 303).
\textsuperscript{87} Id. at 1521.
\textsuperscript{88} Id. at 1522 (citations omitted).
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Consequently, Chief Judge Butler excluded Carlson's testimony and granted summary judgment for defendants.90

Upon plaintiff's motion for reconsideration on the grounds that the Daubert factors were too inflexible to be useful in cases involving technical analysis, Chief Judge Butler conceded that Daubert's factors were illustrative only. However, the court ruled that even without applying the Daubert factors, Carlson's "visual inspection method" lacked sufficient foundation of reliability.91 The court, therefore, affirmed its earlier ruling excluding Carlson's expert testimony and granting defendant's motion for summary judgment.92

The United States Court of Appeals for the Eleventh Circuit reversed and remanded, holding that the Daubert gatekeeping factors relied upon by Chief Judge Butler to exclude Carlson's expert testimony did not apply to his expert testimony because it was non-scientific.93 Writing for the three-judge panel, Circuit Judge Stanley F. Birch Jr. explained that Daubert is limited to providing "a method for evaluating the reliability of witnesses who claim scientific expertise."94 Only if the expert witness relies upon scientific analysis may the trial court exercise gatekeeping responsibility in excluding expert testimony by applying the Daubert factors or their equivalence. In effect, Circuit Judge Birch was taking the more traditional approach which assumes that juries are capable of assessing the reliability of non-scientific experts, much as they are required to assess the reliability of lay witnesses generally.

In distinguishing between scientific and non-scientific expert testimony, the court explained: "a scientific expert is an expert who relies on the application of scientific principles, rather than on skill- or experience-based observations, for the basis of his opinion."95 Judge Birch explained that the distinction between scientific and non-scientific expert testimony is important because Daubert's gatekeeping role for evaluating scientific evidence "is not intended to serve as a replacement for the adversary system: Vigorous cross-examination, presen-

89. Id. at 1522.
90. Id. at 1524.
94. Carmichael, 131 F.3d at 1435 (quoting United States v. Sinclair, 74 F.3d 753, 757 (7th Cir. 1996)).
95. Id. at 1435 (citing Daubert, 509 U.S. at 590).
tation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.\textsuperscript{96}

Applied to the facts of the case, Judge Birch opined that Carlson’s testimony regarding the tire defect was more like the experience-based beekeeper “(which we would usually expect a district court to allow a jury to evaluate),”\textsuperscript{97} than the testimony of a scientific-based aeronautical engineer, who’s testimony should reasonably be subject to the more rigorous \textit{Daubert} tests:

Like a beekeeper who claims to have learned through years of observation that his charges always take flight into the wind, Carlson maintains that his experiences in analyzing tires have taught him what “bead grooves” and “sidewall deterioration” indicate as to the cause of a tire’s failure.\textsuperscript{98}

Because the district court had erred in applying the more rigorous \textit{Daubert} factors to exclude Carlson’s nonscientific testimony, the Eleventh Circuit reversed and remanded the case for further review because the trial court still had a duty under Rule 702 to “determine if Carlson’s testimony is sufficiently reliable and relevant to assist a jury.”\textsuperscript{99} In assessing this issue, the court made it clear that a more lenient standard for admissibility, one that relies more on the traditional checks of the adversarial system than the technical \textit{Daubert} factors, should be applied.

The United States Supreme Court accepted certiorari to answer “in light of uncertainty among the lower courts about whether, or how, \textit{Daubert} applies to expert testimony that might be characterized as based not upon ‘scientific’ knowledge, but rather upon ‘technical’ or ‘other specialized’ knowledge.”\textsuperscript{100}

More specifically, the Supreme Court in \textit{Kumho} accepted certiorari to answer the narrow issue: “whether a trial judge determining the ‘admissibility of an engineering expert’s testimony’ may consider” the \textit{Daubert} factors.\textsuperscript{101}

Reversing the Court of Appeals, Justice Stephen G. Breyer, writing for a unanimous Court, answered affirmatively: “Emphasizing the word ‘may’ in the question, we answer that question yes.”\textsuperscript{102}

\begin{footnotesize}
\textsuperscript{96} \textit{Id.} at 1435 (quoting \textit{Daubert}, 509 U.S. at 596; United States v. 14.38 Acres of Land, 80 F.3d 1074, 1078 (5th Cir. 1996)).
\textsuperscript{97} \textit{Id.} at 1436.
\textsuperscript{98} \textit{Id.}
\textsuperscript{99} \textit{Id.} at 1436-37 (citing 14.38 Acres of Land, 80 F.3d at 1078).
\textsuperscript{100} \textit{Kumho Tire Co.}, 526 U.S. at 146-47. (comparing Watkins v. Telsmith, Inc., 121 F.3d 984, 990-991 (5th Cir. 1997) with Compton v. Subaru of Am., Inc., 82 F.3d 1513, 1518-19 (10th Cir. 1996)).
\textsuperscript{101} \textit{Id.} at 149.
\textsuperscript{102} \textit{Id.} at 150.
\end{footnotesize}
Breyer explained that the district court had properly applied *Daubert* to Carlson’s non-scientific testimony: “*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.”103 However, the Court emphasized the “broad latitude” the district court enjoys when deciding the preliminary reliability issue: “the test of reliability is ‘flexible,’ and *Daubert’s* list of specific factors neither necessarily nor exclusively applies to all experts in every case.”104

Rather than merely holding that *Daubert* applies to scientific and nonscientific cases alike and remanding, the Court applied *Joiner’s* “abuse-of-discretion” standard for reviewing “a trial court’s decision to admit or exclude expert testimony,” to the facts of the case.105 The Court observed that the district court had not doubted Carlson’s expert qualifications as a mechanical engineer with 10 years experience with Michelin and separate experience as a tire failure consultant who had previously testified in other tort cases.106 Rather, the district court had found unreliable “the methodology employed by the expert in analyzing the data obtained in the visual inspection, and the scientific basis, if any, for such an analysis.”107 Specifically, the court, applying a *Daubert* analysis, found insufficient foundation to establish the reliability of Carlson’s methodology whereby he determined by visual and tactile observation that the tire that blew out failed as a consequence of a tire defect rather than tire abuse.108

According to the trial court, Carlson’s methodology for distinguishing between “abuse” and “defect” was unreliable for two reasons. First, Carlson’s basic theory, that in the absence of evidence of at least

103. *Id.* at 141.
104. *Id.* The Court summarized the four *Daubert* factors as follows:
   - Whether a “theory or technique . . . can be (and has been) tested”;
   - Whether it “has been subjected to peer review and publication”;
   - Whether, in respect to a particular technique, there is a high “known or potential rate of error” and whether there are “standards controlling the technique’s operation”; and
   - Whether the theory or technique enjoys “general acceptance” within a “relevant scientific community.”
105. *Id.* at 152 (quoting *Joiner*, 522 U.S. at 138-39). Justice Stevens, concurring with the Court’s application of the *Daubert* factors to nonscientific testimony, wrote a separate opinion dissenting in part over the Court’s decision to decide “whether the trial judge abused his discretion when he excluded the testimony of Dennis Carlson.” *Id.* at 1179 (Stevens, J., concurring in part, dissenting in part).
106. *Id.* at 153-54.
108. *Id.* at 153-55.
two of his four signs of tire abuse it reasonably may be assumed that a tire that separates does so as consequence of a tire defect, was unreliable. Second, the court also found unreliable the subjectiveness of Carlson's ability through visual and tactical observations to determine that a tire failed as a result of abuse despite the fact that the specific tire conceded "had traveled far enough so that some of the tread had been worn bald; it should have been taken out of service; it had been repaired (inadequately) for punctures; and it bore some of the very marks that the expert said indicated, not a defect, but abuse through overdeflection." The Court concluded that the trial judge had not abused his discretion in finding that Carlson's methodology was unreliable because it satisfied "none" of the Daubert factors. The Court suggested that the trial court's "initial opinion might have been vulnerable" to the criticism of relying "too rigidly" to the view that "a failure to satisfy any one of those criteria automatically renders expert testimony inadmissible." However, upon reconsideration, the trial court had acknowledged that "Daubert was intended neither to be exhaustive nor to apply to every case." The court, therefore, had not abused its discretion in excluding Carlson's testimony "upon Carlson's failure to satisfy either Daubert's factors or any other set of reasonable reliability criteria."


Punctuating the authority of the appellate courts to decide the Rule 702 reliability issue without remanding the case for further consideration, the United States Supreme Court in Weisgram v. Marley Co. directed a judgment as a matter of law against the jury verdict winner. Weisgram involved a wrongful death action filed when Bonnie Weisgram died from carbon monoxide poisoning caused by a fire in her home. The trial court admitted the expert testimony of three of plaintiff's witnesses who each testified, over defendant's Daubert objections, that a defect in a heater manufactured by the defendant

109. Id. at 154 (identifying as Carlson's four signs of abuse: "Proportionately greater tread wear on the shoulder; signs of grooves caused by the beads; discolored sidewalls; marks on the rim flange").
110. Id. at 154-55.
111. Id. at 154.
112. Id. at 156 (citing Carmichael, 923 F. Supp. at 1521).
113. Id. at 158.
114. Id. (quoting Daubert, 509 U.S. at 594-595).
115. Id.
caused both the fire and Weisgram's death.\textsuperscript{118} In addition to objecting to plaintiff's expert testimony when it was offered, the defendant at the close of Weisgram's evidence and again at the close of all the evidence unsuccessfully moved for a judgment as a matter of law.\textsuperscript{119}

On appeal, the United States Court of Appeals for the Eighth Circuit reversed, reasoning that the expert testimony of Weisgram's expert witnesses should have been excluded under \textit{Daubert} as speculative.\textsuperscript{120} Rather than exercising the court's discretionary authority to remand for a new trial under Rule 50(d) of the Federal Rules of Civil Procedure, the Eighth Circuit directed a judgment as a matter of law in defendant's favor.\textsuperscript{121}

On appeal to the United States Supreme Court, the plaintiff argued that under Rule 50(d) an appellate court may not order the entry of judgment for the verdict loser when an appellate court has excluded evidence, but must remand to consider whether a new trial is necessary.\textsuperscript{122} Affirming the Eighth Circuit's directed verdict in favor of the defendant, the United States Supreme Court held that following \textit{Daubert} and \textit{Kumho}, all parties have been put on notice of the "exacting standards of reliability" expert testimony must meet:

> It is implausible to suggest, post-\textit{Daubert}, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail. (We therefore find unconvincing) Weisgram's argument that allowing courts of appeal to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other means had they known their expert testimony would be found inadmissible.\textsuperscript{123}

Thus \textit{Weisgram} reaffirms the reallocation of power between court and jury that \textit{Daubert}/Joiner/\textit{Kumho} have previously established. \textit{Daubert}'s liberalizing impulse has been turned into "exacting standards of reliability" which both the trial judge and the appellate judges have the responsibility to evaluate, recognizing that the trial court's initial decision is subject to an abuse of discretion standard.

\textsuperscript{118} \textit{Weisgram}, 528 U.S. at 445.
\textsuperscript{119} \textit{Id}.
\textsuperscript{120} \textit{Id}.
\textsuperscript{121} \textit{Id}.
\textsuperscript{122} \textit{Id.} at 445-46.
\textsuperscript{123} \textit{Id.} at 455-56.
The Standard of Admissibility of Expert Evidence in Nebraska

For many years the Nebraska courts followed the Frye standard without discussing the issues involved. The standard was formally adopted in State v. Reynolds. The Nebraska Supreme Court for the first time discussed extensively the Frye standard and outlined a foundational checklist in Nebraska in the DNA case, State v. Houser. According to the foundational outline presented in Houser, in those cases where counsel attempts to introduce a novel form of scientific evidence, the trial court “must conduct an initial inquiry to determine whether the new technique or principle is sufficiently reliable to aid the jury in reaching accurate results.” At this Frye hearing, the court must make several foundational determinations. First, the challenged expert must be qualified within the scientific field under consideration. Second, the trial court should make a preliminary finding that the scientific theory is generally accepted within the scientific community. Third, the court should also make a factual finding outside the presence of the jury regarding whether the relevant methodology is generally accepted as reliable for forensic purposes within the scientific community. Fourth, the trial court must determine whether the generally accepted protocols were in fact properly followed under the facts of the case. Fifth, the court should consider the reliability of the probability calculations, if any are given. Finally, the court should consider whether the probative value of the expert’s probability testimony is outweighed by its prejudicial effect. This foundational framework for the Frye hearing applied only to expert testimony involving novel scientific evidence in Nebraska prior to Schafersman v. Agland Coop.

127. Houser, 241 Neb. at 550, 490 N.W.2d at 184 (citations omitted).
128. Id. at 550, 490 N.W.2d at 184 (citations omitted).
129. Id. (citations omitted).
130. Id. (citations omitted).
131. Id. (citations omitted).
132. Id. (citations omitted).
ADMISSIBILITY OF EXPERT TESTIMONY

702[D.4.c.ii] The Nebraska Supreme Court’s Initial Rejection of Daubert

The United States Supreme Court’s holding in Daubert v. Merrell Dow Pharmaceuticals, Inc.\(^{134}\) that Rule 702 had preempted the Frye standard, prompted the question as to whether the Nebraska Supreme Court would interpret the verbatim language of Nebraska’s Rule 702 the same way. In both State v. Carter\(^{135}\) and State v. Dean,\(^{136}\) the Nebraska Supreme Court initially rejected Daubert and expressed an intent to continue to follow the Frye standard. The Court in Carter explained:

*Daubert*, by its own terms, does not apply to state court proceedings . . . .

In our consideration of whether to adopt the *Daubert* standard, we have acknowledged the problems involved in the application of *Frye*, such as identifying the relevant scientific community and the ambiguity about what constitutes “general acceptance;” however, we also recognized that in application, *Daubert* leaves many similar questions unanswered.\(^{137}\)

In *Dean* the Court reiterated:

We thus adhere to the *Frye* standard, under which the proponent of the evidence must prove general acceptance by surveying scientific publications, judicial decisions, or practical applications, or by presenting testimony from scientists as to the attitudes of their fellow scientists . . . . Moreover, evidence of a test result cannot be characterized as “scientific” or qualify as “technical or other specialized knowledge,” and thus within the purview of § 27-702, unless and until it is established that the test result demonstrates what it is claimed to demonstrate.\(^{138}\)

Following *Carter* and *Dean*, the Nebraska courts continued to adhere to *Frye* over *Daubert*,\(^{139}\) but clear indications of sympathy for *Daubert* appeared before *Schafersman*.

\(^{134}\) 509 U.S. 579 (1993).

\(^{135}\) 246 Neb. 953, 524 N.W.2d 763 (1994).


\(^{139}\) State v. Buckman, 259 Neb. 924, 940, 613 N.W.2d 463, 477 (2000) (admitting over objections serological tests of blood and saliva as well as statistical frequency tables relying on only two racial classifications based on testimony that they were generally accepted and relied upon by experts in scientific community); State v. Baue, 258 Neb. 968, 985, 607 N.W.2d 191, 204 (2000) (upholding the admissibility of the test re-
Justice John M. Gerrard, joined by Chief Justice John V. Hendry and Justice Lindsey Miller-Lerman, in a well-reasoned concurring opinion in *Phillips v. Industrial Machine*, 140 first recommended that the Court adopt the *Daubert/Kumho* standard for admitting expert testimony in place of the *Frye* standard. 141 The contested evidence in *Phillips*, a personal injury case arising from a motor vehicle accident, involved the expert testimony of a vocational rehabilitation consultant. 142 The injury at issue was a post traumatic cervical strain. Dr. Daniel R. Ripa testified, to a reasonable degree of medical certainty, that Phillips' injury was permanent. 143 However, he had not been asked to evaluate the effect of the injury on Phillips' work activities and had given no testimony that the injury had effected Phillips' functional work capacity. 144

Alfred J. Marchisio, Jr., a vocational rehabilitation consultant, was called for the purpose of establishing Phillips' work impairment. Marchisio, relying on the New Work Life Expectancy Tables, expressed an opinion that there is a statistical correlation between the overall health of employees and their likelihood of remaining in the work force for an extended period of time. 145 Relying upon Doctor Ripa's testimony that Phillips' injury was permanent, Marchisio expressed an opinion that there was a statistical probability that Phillips' injury would likely reduce her work life expectancy from the age of 54.2 to the age of 38.9. 146 Despite the fact that Phillips had only $2,236.82 in medical damages, no loss of wages or property damages, the jury awarded $102,236.82 in damages. 147 The size of the award in comparison to the special damages, suggested that the jury indeed had accepted Marchisio's reduced work life expectancy.

The Court granted defendant's motion for a new trial on the grounds that Marchisio's testimony that Phillips was "disabled" within the meaning of the term as used by the New Work Life Expectancy Tables amounted to medical testimony and "was so generic and lacking in certainty that it failed to make the existence of a disputed

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143. *Id.* at 257, 597 N.W.2d at 379.
144. *Id.*
145. *Id.* at 259-60, 597 N.W.2d at 381.
146. *Id.*
147. *Id.* at 257, 597 N.W.2d at 379, 381.
fact more or less probable, and was of no value to the jury."\textsuperscript{148} Affirming the trial court's order granting a new trial, the Nebraska Supreme Court held that the trial court had not abused its discretion in deciding that Marchisio's testimony, that Phillips' injury qualified as an employment disability within the statistical significance of the New Work Life Expectancy Tables, lacked sufficient foundation.\textsuperscript{149}

Justice Gerrard wrote an articulate and well-reasoned concurring opinion recommending that it is time for the Nebraska Supreme Court to reject the \textit{Frye} test in favor of the United States Supreme Court's decisions in \textit{Daubert v. Merrell Dow Pharmaceuticals, Inc.},\textsuperscript{150} \textit{General Electric Co. v. Joiner},\textsuperscript{151} and \textit{Kumho Tire Co., Ltd. v. Carmichael}.\textsuperscript{152} Justice Gerrard recommended adopting \textit{Daubert}'s four-part test as a "flexible" standard for considering the reliability of expert testimony.\textsuperscript{153} He also noted that \textit{Joiner} had established an "abuse of discretion" standard as the proper standard of appellate review for reviewing a trial court's evidentiary rulings regarding expert testimony.\textsuperscript{154} Additionally, he recommended extending the \textit{Daubert} rule beyond scientific evidence in keeping with \textit{Kumho}:

the Supreme Court determined that "\textit{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."\textsuperscript{155}

In justification of his recommendation, Justice Gerrard noted both that \textit{Daubert} has become the majority rule in most states and that the gatekeeping responsibility identified in \textit{Daubert} is important, given "the inordinate weight and deference that jurors are often inclined to afford expert testimony."\textsuperscript{156}

Applied to the facts of the case, Justice Gerrard disagreed with the majority's conclusion that Marchisio, as a vocational rehabilitation expert, was not qualified to give an opinion that Phillips was disabled "as that term is used in the field of vocational rehabilitation."\textsuperscript{157} As a

\textsuperscript{148} Id. at 261, 597 N.W.2d at 381 (quoting the trial court). \textit{Compare} Snyder v. Emasco Ins. Co., 259 Neb. 621, 611 N.W.2d 409, 417 (2000) (permitting a vocational rehabilitation expert to testify regarding loss of earning capacity based in part upon medical records reflecting the injured party's physical condition and degree of impairment).

\textsuperscript{149} Id. at 266, 597 N.W.2d at 384 (quoting the trial court).

\textsuperscript{150} 509 U.S. 579 (1993).

\textsuperscript{151} 522 U.S. 136 (1997).

\textsuperscript{152} 526 U.S. 137 (1999).

\textsuperscript{153} \textit{Phillips}, 257 Neb. at 277, 597 N.W.2d at 391 (Gerrard, J., concurring).

\textsuperscript{154} Id. at 270, 597 N.W.2d at 386 (Gerrard, J., concurring).

\textsuperscript{155} Id. at 269, 597 N.W.2d at 386 (Gerrard, J., concurring).

\textsuperscript{156} Id. at 275, 597 N.W.2d at 390 (Gerrard, J., concurring) (citations omitted).

\textsuperscript{157} Id. at 279, 597 N.W.2d at 392 (Gerrard, J., concurring).
vocational expert, Marchisio could have testified that Phillips' permanent injuries established by Doctor Ripa may well effect Phillips' employability, but he could not reasonably rely upon the "New Work Life Expectancy Tables" to form an opinion of Phillips' reduced work life expectancy. In effect, Marchisio's reliance upon the tables constituted a methodological flaw because there had been insufficient foundation that the tables were in fact reliable for such a broad range of "disabilities" as a vocational rehabilitation expert might find present. The foundational weakness, according to Justice Gerrard, involved the competency of Marchisio outside his area of expertise. Chief Justice Hendry and Justice Miller-Lerman also joined in this concurrence. Their well-reasoned three-judge concurrence suggested that the Court was ready to hear a properly briefed and argued Daubert issue.

702[D.A.c.iv] Nebraska's Adoption of the Daubert Standard in Schafersman

The Nebraska Supreme Court on July 20, 2001 in Schafersman v. Agland Coop,158 was presented with a properly briefed and argued Daubert issue. In Schafersman the Court announced the replacement of the Frye standard by the Daubert standard for all cases commencing on or after October 1, 2001.159

Schafersman involved a negligence action filed by dairy farmers against a farm cooperative.160 The Plaintiffs, John and Eileen Schafersman, operate a dairy farm in Washington County, Nebraska. They ordered unadulterated commercial grade oats from the Defendant, Agland Cooperative, for their dairy cows.161 The Defendant delivered oats contaminated with "a hog premix concentrate that included high-protein minerals, vitamins, and other micronutrients."162 When the fifty-four cows that had consumed the contaminated feed became sick and dropped out of milk production, the Plaintiffs filed suit against the Defendant for its negligence in delivering the contaminated feed.163 The Defendant did not dispute that it had delivered contaminated feed, but disputed the causal connection between the contaminated feed and the subsequent illnesses that the cows suffered.164

In support of their theory of causation, the Plaintiffs presented the expert testimony of Doctor Wass, a board certified veterinarian

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160. Schafersman, 262 Neb. at 217, 631 N.W.2d at 867.
161. Id.
162. Id.
163. Id. at 218, 631 N.W.2d at 868.
164. Id. at 219, 631 N.W.2d at 868.
who is a professor at Iowa State University in the department of diagnostic and production animal medicine.\textsuperscript{165} Without treating or performing any clinical examination on any of the cows, Wass testified that it was his opinion that the cows were afflicted with "multiple mineral toxicity" as a consequence of their eating the contaminated oats.\textsuperscript{166} Wass's theory was that "multiple mineral toxicity" "could result when a number of potentially toxic materials were simultaneously fed to cows in otherwise-tolerable quantities."\textsuperscript{167} However, "Wass admitted that no minerals were present in the feed that were, singly, above scientifically accepted toxic or even tolerable levels."\textsuperscript{168}

The Defendant unsuccessfully challenged the admissibility of Wass's expert testimony on foundational grounds at each stage of the litigation.\textsuperscript{169} The Defendant filed a motion in limine seeking to exclude Wass's testimony, objected during the trial on foundational grounds and raised the issue on appeal.\textsuperscript{170} Specifically, Defendant argued on appeal that Wass's testimony lacked adequate foundation under either the \textit{Frye} or the \textit{Daubert} standard of admissibility and that the Nebraska Supreme Court should reconsider adopting the \textit{Daubert} standard in place of \textit{Frye}.\textsuperscript{171}

Writing for a unanimous court, Justice Gerrard ruled that Wass's expert testimony lacked adequate foundation under either \textit{Frye} or \textit{Daubert}.\textsuperscript{172} First, applying the \textit{Frye} standard, the Court ruled that Wass's theory of "multiple mineral toxicity" was a novel theory for which the Plaintiff had introduced insufficient foundation to prove the general acceptability of the theory.\textsuperscript{173} Additionally, the Court ruled that while Wass had formed an opinion on causation, he had not conducted any "differential diagnosis to rule out other potential causes of any illnesses."\textsuperscript{174}

Second, while "not necessary for our disposition of the present appeal[,]" the Court adopted the \textit{Daubert} standard for admissibility of expert testimony.\textsuperscript{175} The Court's listing of the non-exclusive factors identified in \textit{Daubert} that a trial court may use to evaluate the reliability of expert testimony includes:

\begin{itemize}
\item \textit{Schafersman}, 262 Neb. at 224, 235, 631 N.W.2d at 871, 878.
\item \textit{Id.} at 221-24, 631 N.W.2d at 870-71.
\item \textit{Id.} at 223, 631 N.W.2d at 871.
\item \textit{Id.} at 224, 631 N.W.2d at 872.
\end{itemize}
(1) whether the theory or technique can be, and has been, tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) the known or potential rate of error, and the existence and maintenance of standards controlling the technique’s operation; and (4) the “general acceptance” of the theory or technique.176

In defense of adopting the Daubert standard, the Court explained that the Court’s prior concerns over (1) the “relatively undeveloped” nature of the Daubert standard and (2) the likelihood that Daubert would open the door for “junk science” were no longer valid concerns.177 The Court explained:

Placing the focus on reliability, rather than general acceptance, may have unexpected but not undesirable results. For instance, a court may find the application of the Daubert standards results in the admissibility of new theories or techniques, where the court is satisfied that the expert testifying has presented foundation sufficient to demonstrate the reliability of the scientific analysis supporting his or her opinion. On the other hand, a court may find that evidence that had previously been admitted with little discussion is no longer satisfactory, where the reliability of that evidence has been appropriately challenged.178

Third, the Court also extended the Daubert standards to “non-scientific” cases of expert testimony in keeping with the United States Supreme Court’s Kumho Tire Co. v. Carmichael.179 Quoting Kumho, the Court adopted the notion:

it would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between ‘scientific’ knowledge and ‘technical’ or ‘other specialized’ knowledge. There is no clear line that divides the one from the others . . . .180

Fourth, the Court acknowledged that “these standards may initially place more demands on trial and appellate courts, but will also permit those courts to ensure that juries in Nebraska are presented with expert testimony that is theoretically and methodologically reliable.”181 For these purposes, the Court concluded: “We therefore hold prospectively, for trials commencing on or after October 1, 2001, that

176. Id. at 225, 631 N.W.2d at 872 (quoting Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)).
177. Id. at 226, 631 N.W.2d at 873.
178. Id. at 227-28, 631 N.W.2d at 874.
179. Id. at 230, 631 N.W.2d at 875 (citing Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999)).
180. Id. at 232, 631 N.W.2d at 876 (quoting Kumho Tire Co., 526 U.S. at 148-49).
181. Id. at 232, 631 N.W.2d at 876.
in trial proceedings, the admissibility of expert testimony under the Nebraska rules of evidence should be determined based upon the standards first set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993)."182

Fifth, the Court held "once the validity of the expert's reasoning or methodology has been satisfactorily established, any remaining questions regarding the manner in which that methodology was applied in a particular case will generally go to the weight of such evidence."183

Finally, in remanding the case for a new trial the Court permitted the Plaintiff to offer additional foundation on the general acceptability of the theory or methodology underlying any expert opinion on causation.184

702[D.4.d] Differences that Schafersman's Adoption of Daubert Will Likely Make in Admitting Expert Testimony in Nebraska

What difference does it make that the Nebraska Supreme Court has adopted the *Daubert* standards in place of the *Frye* standard? In brief, the differences include: (a) the increased availability of judicial authority concerning a wide range of expert issues; (b) the varied types of questions relevant in discovery; (c) the increased importance of pretrial hearings on a wide range of expert evidence questions; (d) the varied categories of gate keeping standards for admissibility; and (e) the increased importance of preparing an adequate *Daubert* record to preserve the trial court's ruling on appellate review of expert evidence questions.

702[D.4.d.i] Increased Availability of Judicial Authority

One of the most immediate and important consequences of the Court's adoption of *Daubert* in *Schafersman*, is the increased availability of precedent from other courts concerning the reliability of various subject matters for expert testimony. Rather than being dependent upon the Nebraska courts having previously considered the reliability issue as applied to the particular area of expertise under the dated *Frye* standard, Nebraska attorneys can now review expert evidence determinations from cases from other jurisdictions (especially the federal courts) that have similarly adopted *Daubert*. Of course, the Nebraska courts will not be bound to follow the analysis of other courts, but their review of the issues will certainly provide a useful starting point. If other courts have considered and either admitted

182. *Id.*
183. *Id.* at 232, 632 N.W.2d at 877.
184. *Id.* at 233, 631 N.W.2d at 877.
or rejected similar expert evidence theories or methodologies, then counsel can ask the court to notice those preliminary findings on the same issues as part of the court's Rule 104(1) determination.

702[D.4.d.ii] Civil Discovery

The Court's adoption of Daubert should dramatically affect the scope of discovery questions in civil cases. Unlike the Federal Rules of Civil Procedure where mandatory discovery somewhat takes the burden off the party preparing for a Daubert challenge, 185 attorneys practicing in Nebraska courts must draft their own discovery requests. Following Schafersman, counsel, as part 186 of their discovery requests

185. Under Federal Rule of Civil Procedure 26(a)(2)(A) each party must "disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence." Rule 26(a)(2)(B) further provides that any such disclosure shall:
be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.


Federal Rule of Criminal Procedure 16(a)(1)(E) also requires:
at the defendant's request, the government shall disclose to the defendant a written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence during its case in chief at trial. This summary must describe the witness' opinions, the bases and the reasons therefore, and the witness' qualifications.


If the defendant makes such a request, the defense under FED. R. CRIM. P. 16(b)(1)(C) must likewise: "disclose to the government a written summary of testimony the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence at trial."

FED. R. CRIM. P. 16(b)(1)(C).

186. The Nebraska Supreme Court in State ex rel. Acme Rug Cleaner v. Likes, suggested the following limitations on impeachment questions that may be requested of experts during discovery:
(1) the expert may be asked what he or she has been asked to do in the pending case and the compensation paid to the expert. (2) The expert may be examined in general about his or her expertise and the nature of his or her work. (3) The expert may be asked to give an approximation of the amount of work performed as an expert for plaintiffs and for defendants and the percentage of each. (4) The expert may be asked what portion of his or her total work is performed as an expert witness, including an approximation of hours expended, percentage of income earned as an expert, and the approximate number of independent medical exams performed per year. (5) The expert shall not be required to disclose the amount of income received for work performed as an expert. (6) In all cases, the privacy of the patients seen and treated by such expert shall be observed. (7) The expert shall not be required to compile or produce documents that are nonexistent other than the information that is required in these guidelines. (8) To the extent that the expert has such information reasonably availa-
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for experts, should include Daubert-inspired interrogatories such as the following:

With regard to the underlying theory upon which the expert’s opinion depends:

a. Whether any underlying theory supporting the expert opinion has been tested? If so, identify each and every test that you relied upon in support of this theory.

b. If this theory has been tested, has the testing been subject to any peer reviewed analysis? If so, identify each and every peer reviewed analysis of which you are aware or upon which you intend to rely.

c. If the theory has been subject to peer reviewed analysis, whether any known rate of error has been established for assessing the reliability of the theory. If so, identify each and every peer reviewed analysis indicating that a known rate of error has been established for assessing the theory’s reliability and indicate the rate of error.

d. Whether the theory is generally accepted in the relevant scientific or expert field. If your answer is yes, then identify the bases of your affirmative answer.

e. Identify any and all literature relied upon by the expert in evaluating any of the above answers.

With regard to the underlying methodology, instrument or technique upon which the expert’s opinion depends:

a. Whether the reliability of the methodology, instrument or technique for applying the theory supporting the expert’s opinion has been tested? If so, identify each and every test that you relied upon in support of this theory.

b. If the reliability of the methodology, instrument or technique for applying the theory has been tested, has the testing been subject to any peer reviewed analysis? If so, identify each and every peer reviewed analysis of which you are aware.

c. If the reliability of the methodology, instrument or technique for applying the theory has been subject to peer reviewed analysis, whether any known rate of error has been established for assessing the reliability of the methodology, instrument or technique. If so, identify each and every peer

ble, the expert shall be required to identify each case in which the expert has testified at trial or by deposition, performed an IME, or other furnished evidence in such case and whether the expert was retained by the plaintiff or the defendant. Such information shall be furnished for the prior 3 years.

State ex rel. Acme Rug Cleaner v. Likes, 256 Neb. 34, 41-42, 588 N.W.2d 783, 788 (1999),
reviewed analysis indicating that a known rate of error has been established for assessing the theory's reliability.

d. Whether the reliability of the methodology, instrument or technique for applying the theory is generally accepted in the relevant scientific or expert field. If your answer is yes, then identify the bases of your affirmative answer.

e. Identify any and all scientific literature relied upon by the expert in evaluating any of the above answers.

Counsel answering any expert discovery request should also make disclosures with the Daubert questions in mind. Counsel should supplement any Daubert-relevant disclosure before trial where additional testimony becomes necessary (Nebraska Rules of Civil Procedure Rule 26(e) and Nebraska Rules of Criminal Procedure Section 29-1912, et. seq.). This obligation to respond fully to discovery requests can be illustrated by the court's discussion in Norquay v. Union Pacific Railroad. In Norquay, the Nebraska Supreme Court discussed the potential consequences if an opponent fails to respond to discovery regarding the testimony of experts. In this railroad accident case, the crucial issue involved a factual finding of the time and distance required for a Union Pacific switch engine to perform an emergency stop. One year before trial, Norquay served interrogatories on Union Pacific asking for the identity of any expert Union Pacific intended to call, the expert's opinion and basis for the opinion. Union Pacific simply answered, "[u]nknown at this time." The trial turned into a battle of experts regarding the stopping time of the switch engine. Norquay's attorney was disadvantaged by Union Pacific's not responding to discovery, but failed to follow up by challenging the expert's testimony. He did not (1) object at trial to Union Pacific's calling an expert witness, (2) object to any expert testifying to undisclosed but discoverable matter, (3) move to strike the expert witness's testimony, (4) move for a continuance, or (5) move for a mistrial.

187. In federal court the consequences for failing to have Daubert in mind when responding to discovery can be illustrated by a few post-Kumho cases. For example, in Black v. Food Lion, Inc., 171 F.3d 308 (5th Cir. 1999), the Fifth Circuit reversed and remanded because the expert's theory that fibromyalgia could be caused by a traumatic event such as the type of slip and fall which occurred in defendant's store "has not... been verified by testing and, thus, has not been peer-reviewed." Black, 171 F.3d at 313. In making such a ruling, the court observed that while the plaintiff's expert had attempted to offer recent studies indicating some link between physical trauma and fibromyalgia, the trial court properly excluded the studies because they had not been properly produced to opposing counsel during discovery. Id. at 313 n. 3.


190. Norquay, 225 Neb. at 530, 407 N.W.2d at 150.

191. Id.
On appeal, the Nebraska Supreme Court stated that Nebraska Court Rule of Discovery for Civil Cases 26(b)(4)(A)(i), entitled the plaintiff to discovery of Union Pacific's expert testimony. Furthermore, "[t]he continuing duty to supplement responses quickly dispatches the ill-advised suggestion by Union Pacific that 'the appropriate thing for [Norquay's lawyer] to do is to have compelled the answers to the interrogatories." Accordingly, Norquay was clearly entitled to sanctions under Nebraska Court Rule of Discovery for Civil Cases Rule 37. However, the Court observed that Norquay's attorney waived appropriate sanctions by failing to make a timely objection, motion to strike, or motion for continuance.

_Norquay_ presents an important lesson for the Nebraska practitioner, especially in light of _Schafersman_. Where expert testimony is possible, counsel should, pursuant to Nebraska Court Rule of Discovery for Civil Cases 26(b)(4)(A)(i), seek discovery with _Daubert_ in mind. If opposing counsel fails to respond properly, then counsel should invoke sanctions available under Nebraska Court Rule of Discovery for Civil Cases 37. Counsel should object at trial to testimony being given that is outside discovery response, move to strike, or motion for continuance.

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192. _Id._ at 537, 407 N.W.2d at 154.
193. _Id._ at 538, 407 N.W.2d at 154.
194. _Id._ at 542, 407 N.W.2d at 156-57.
196. See Neb. Ct. R. Disc. 26(b)(4)(A)(i). This section reads:
A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.
197. See Neb. Ct. R. Disc. 37. This section reads in relevant part:
If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

. . .

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him or her from introducing designated matters in evidence[.]

198. For example, in _Martindale v. Weir_, 254 Neb. 517, 520, 577 N.W.2d 287, 289 (1998), a medical malpractice expert at trial attempted to supplement the answer he had given during a deposition regarding how the physician had violated the standard of care. The Nebraska Supreme Court affirmed the trial court's exclusion of any supplemental response on the grounds that postulating a new theory of negligence at trial "would present an undue surprise as postulating negligence on a different basis than disclosed previously." _Martindale_, 254 Neb. at 518-19, 577 N.W.2d at 288. Similarly, in _Schindler v. Walker_, 256 Neb. 767, 778, 592 N.W.2d 912, 920 (1999), the defendants had served interrogatories on plaintiff requesting production of any autopsy or post mortem examination. Plaintiff initially responded that she was unaware of any autopsy or post
if admitted, move for a continuance if the court denies the previous motions, or move for a mistrial.

On a separate, but related point, Nebraska Discovery Rules for Civil Cases 26(b)(4) provides for a right to have interrogatories answered, but does not expressly provide the right to take the deposition of the experts. Rule 26(b)(4)(A)(ii) does provide: "Upon motion, the court may order further discovery by other means . . . ." The "other means" obviously includes deposition testimony, which has since become common practice in both state and federal courts. Schafersman increases the importance of counsel taking depositions of opposing experts. If it becomes apparent during the deposition that the opponent's expert cannot satisfy the foundational requirements of Daubert, then counsel should seek a Daubert hearing and conjoin it with a motion for summary judgment where appropriate.


Although the discovery rules in criminal cases are much more limited than civil cases, the Daubert issue also applies to the limited criminal discovery available. Neb. Rev. Stat. § 29-1602 provides that a prosecutor, when filing an information, shall

endorse thereon the names of the witnesses known to him at the time of filing the same; and at such time thereafter, as the court or a judge thereof in vacation, in its or his discretion, may prescribe, he shall endorse thereon the names of such other witnesses as shall be known to him.

Additionally, Nebraska Rules of Criminal Discovery § 29-1912, et.seq. provide for criminal discovery rules at the criminal defendant's election comparable to the civil discovery rules. The Nebraska Supreme Court has held a prosecutor's failure to turn over exculpatory evidence pursuant to Brady v. Maryland, to be prosecutorial misconduct requiring reversal. Moreover, this rule extends to evidence that is relevant to the defense solely for corroborating testimony, or assisting impeachment or rebuttal. Surely the Brady rule extends to expert evidence findings and opinions.

mortem examination, but two weeks before trial updated her response by informing defendants that they had obtained a disinterment permit and had conducted an autopsy. Schindler, 256 Neb. at 778, 592 N.W.2d at 920. Because the autopsy "amounted to destructive testing with no notice of the autopsy being given to appellees to allow appellees to have simultaneous access to Gerald's body, that fact alone would justify the trial court's exclusion of the autopsy results." Id. at 780, 592 N.W.2d at 921.

The Nebraska courts prior to Schafersman required that if counsel raised an issue of the admissibility of a novel form of scientific testimony, the trial court “must conduct an initial inquiry to determine whether the new technique or principle is sufficiently reliable to aid the jury in reaching accurate results.”\(^{204}\) For non-novel expert testimony, Frye hearings were neither necessary nor generally permitted. That did not mean that challenges to non-novel expert testimony did not occur prior to Schafersman, but simply that such challenges occurred primarily during the trial and focused on either the qualifications of the expert\(^{205}\) or the inadequacy of the factual support for the expert’s opinions\(^{206}\) rather than the unreliability of the theory or methodology. That should all change as a consequence of the Court’s adoption of Daubert in Schafersman. For the future, the Daubert issue may arise for all experts at all levels (competency, theory, methodology and application) at (1) pretrial Daubert hearings or motions in


\(^{205}\) See, e.g., McGuire v. Dep’t of Motor Vehicles, 253 Neb. 92, 97 568 N.W.2d 471, 475 (1997) (excluding the opinion of the arresting officer regarding the results of a breath test administered with an Intoxilyzer Model 4011AS because while the state established that the arresting officer was “certified” to administer the test, the state failed to establish foundation that she held a valid permit issued by the Department of Health as required by § 60-6,201(3)).

\(^{206}\) Priest v. McConnell, 219 Neb. 328, 333, 363 N.W.2d 173, 176-77 (1985) (reversing where defendant’s expert had been allowed to testify that defendant’s answer to the question who was driving, “I guess I was,” was consistent with “confabulation” (the process by which a person who has experienced a blank period of memory as a consequence neurological damage to the brain either through alcohol or drug abuse or a blow to the head constructs a plausible explanation of his actions based on past experience rather than reality in fact), because the doctor on voir dire admitted that he had no evidence in this case that their had been sufficient alcohol or drugs in the body to produce “alcoholic blackout” or that the witness had suffered a blow to the head sufficient to produce the confabulation effect); Fletcher v. State, 216 Neb. 342, 351, 344 N.W.2d 899, 905 (1984) (reversing because the trial court had failed to strike expert testimony given on direct, despite the fact that it became clear on cross-examination that the expert had no foundational bases for the opinion); Danielsen v. Richards Mfg. Co., 206 Neb. 676, 686, 294 N.W.2d 858, 863 (1980) (affirming a judgment allowing an expert witness to provide testimony where both the basis of the expert’s opinion and the underlying facts supporting the opinion had been presented to the jury as opposed to a mere guess or conjecture”); Dawson v. Papio Natural Resources District, 206 Neb. 225, 232, 292, N.W.2d 42, 47 (1979) (reversing a judgment in a condemnation proceeding because “the underlying factors necessary for [the experts] to reach such a conclusion are totally lacking in the record. It is fundamental that the plaintiff's burden to prove the nature and amount of damages cannot be sustained by evidence which is speculative and conjectural”); Clearwater Corp. v. City of Lincoln, 202 Neb. 796, 804, 277 N.W.2d 236, 241 (1979) (“Expert testimony should not be received if it appears the witness is not in possession of such facts as will enable him to express a reasonably accurate conclusion as distinguished from a mere guess or conjecture.”).
limine; (2) evidentiary objections during the trial; (3) post-judgment motions; and (4) on appeal. For questioned expert testimony in Nebraska courts in future trials, counsel should object on all foundational levels both early and often.207

702[D.5.b] Stages of Federal Court Proceedings

702[D.5.b.i] The Daubert Pretrial hearing or Motion in Limine or Motion to Exclude Evidence

Although Weisgram makes it clear that the Daubert issue may be revisited at every stage of the proceedings if properly preserved by objection, the paradigmatic way to begin challenging expert testimony, as illustrated by the procedural context of Daubert, Joiner and Kumho, is by filing a pretrial motion in limine or motion to exclude testimony. The Daubert motion in limine is most appropriate when challenging either the expert theory or methodology, but is also within the trial court's discretion when considering the conclusions as well. Several cases may be illustrative.

702[D.5.b.i.a] Daubert Pre-Trial Motion Challenges to Theory and Methodology Mandatory

For example, the United States Court of Appeals for the Eighth Circuit in United States v. Iron Cloud,208 reversed and remanded a jury conviction for involuntary manslaughter because the court had both refused defendant's request for a Daubert hearing and had improperly admitted, over defendant's objection, a portable breath test ("PBT") as evidence of the defendant's intoxication.209 The Eighth Circuit explained: "[b]y denying Iron Cloud's request for a Daubert hearing on the reliability of the PBT, the judge took the accuracy of the PBTs for granted and he ignored established procedure."210 Contrary to the court's assertion of general acceptance of the PBT, the Eighth Circuit pointed out that because of the inherent unreliability of the PBT no court has permitted the government to admit the PBT re-

207. Lincoln Branch, Inc. v. City of Lincoln, 245 Neb. 272, 279-80, 512 N.W.2d 379, 385 (1994) ("Once admitted without objection, the weight and credibility of the expert's valuation testimony is a question for the jury... This is an application of the principle that one cannot silently tolerate error, gamble on a favorable result, and then complain that one guessed wrong."); Tank v. Peterson, 219 Neb. 438, 448, 363 N.W.2d 530, 537-38 (1985) (reversing a directed verdict in a wrongful death case because the trial court had improperly excluded the testimony of three experts who attributed the cause for the plane crash to pilot error, despite the fact that the opponent had not established the inadequacy of the bases of the opinions on cross-examination).
208. 171 F.3d 587 (8th Cir. 1999).
210. Iron Cloud, 171 F.3d at 590.
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results for any purpose other than to prove probable cause for arrest. Consequently, not only had the trial court erred in not permitting the defense to challenge the expert testimony in a Rule 104(a) Daubert pretrial hearing, the court compounded the error by admitting the evidence during the trial over defendant's Rule 702 objection.

Similarly, the court in United States v. Van Wyk, granted defendant's motion in limine to the extent it addressed the unreliability of the prosecutor's technique for determining authorship of handwriting. Although the court permitted the expert in handwriting analysis to explain to the jury the points of comparison between the known writings of the defendant and questioned documents, the court excluded the expert's opinion testimony that the defendant was the author of the threatening writings. The court explained that the methodology or technique of "forensic stylistics analysis" failed the Daubert tests for assessing reliability and, therefore, the expert's opinion depending thereon was inadmissible.

702[D.5.b.i.b] Daubert Pre-Trial Challenges to Application or Conclusions Discretionary

If the foundational challenge to an expert's opinion goes to the expert's conclusions, rather than the theory or methodology relied upon in forming the conclusion, then the trial court has a broader discretion whether to hold a pretrial Daubert hearing. For example, the court in United States v. Nichols, held that the trial court had not abused its discretion in refusing to hold a Daubert preliminary hearing to exclude evidence when the challenge went to the conclusions drawn from reliable theories and methodologies. The witness, a forensic explosives expert, was permitted to give an opinion on the type of bomb involved in the Oklahoma City bombing. The trial court refused to hold a Daubert hearing based upon a finding that the challenged evidence neither involved a novel scientific theory nor required use of an untested methodology. Because the defendant's challenges were to the conclusions drawn from the collection of the items tested and the manner in which the lab work was performed (rather than theory or methodology), the court had not abused its discretion in

211. Id. (citations omitted).
215. Id. at 520.
216. 169 F.3d 1255 (10th Cir. 1999).
217. United States v. Nichols, 169 F.3d 1255, 1263-64 (10th Cir. 1999).
218. Nichols, 169 F.3d at 1263.
refusing to conduct a Rule 104(a) preliminary hearing. The court held
that questions regarding compliance with valid protocols were matters
"involving the credibility of witnesses and weighing of the evidence,
both of which were more suitable for resolution by the jury."219

Similarly, the United States Court of Appeals for the Sixth Cir-
cuit in Greenwell v. Boatwright,220 affirmed the trial court's refusal to
conduct a Daubert hearing before permitting the defendant's accident
reconstructionist to testify.221 The plaintiff challenged the founda-
tional adequacy of the defendant's accident reconstructionist's testi-
mony because he relied solely on the physical evidence at the scene of
the accident, rather than the conflicting eyewitness testimony of the
event.222 Affirming on appeal, the Sixth Circuit held that the Daubert
hearing was most appropriate when challenging the scientific theory
or methodology underlying the expert's testimony, rather than the
conclusions generated therefrom.223

However, other courts have conducted Daubert hearings and
granted summary judgment based solely upon lack of factual founda-
tion supporting the expert's opinion. The responsibility of the propo-
nent of expert testimony to provide adequate foundational support at
the Daubert pretrial hearing can be illustrated by the United States
Court of Appeals for the Eighth Circuit decision in Jaurequi v. Carter
Manufacturing Co.224 In this products liability case, in which the
plaintiff's legs had been amputated in an accident with a combine
manufactured by John Deere, the plaintiff's expert proposed to give
testimony that the combine had design and warning defects that were
causally responsible for plaintiff's injuries.225 Deere moved in pretrial
motions both for the exclusion of the plaintiff's expert testimony and
for summary judgment.

In support of defendant's motion for summary judgment, Deere
offered "its highly detailed and annotated statement of uncontested
material facts..."226 In opposition to the motion for summary judg-
ment, plaintiff "did not provide countervailing citations to depositions
or even a statement of contested facts. In particular, Jaurequi did not
cite to any of his deposition testimony to refute any of Deere's factual

1997) (deciding the same issue), aff'd sub nom. United States v. Nichols, 169 F.3d 1255
(10th Cir. 1999)).
220. 184 F.3d 492 (6th Cir. 1999).
222. Id. at 497 (citing Daubert, 509 U.S. at 594-95 and United States v. Bonds, 12
F.3d 540, 556 (6th Cir. 1993)).
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assertions." Instead, plaintiffs relied exclusively on the summary testimony of plaintiff's experts, whose testimony was ultimately excluded as a consequence of the Daubert hearing.

On appeal to the United States Court of Appeals for the Eighth Circuit, plaintiff argued in an appellate brief that "Deere grossly misstated the evidence and consequently every single finding of the district court used to support its decision was contrary to the record." The plaintiff in the appellate brief then alleged the "true facts." The Eighth Circuit responded: "The effort comes too late. It should have been done in response to Deere's motion before the district court."

Similarly, the United States Court of Appeals for the Seventh Circuit in Clark v. Takata Corp. upheld the trial court's motion to strike expert testimony based upon the inadequacy of the factual support and, consequently, also granted the defendant's motion for summary judgment. Plaintiff's expert had a Ph.D. in mechanical engineering, was a Professor-Director Emeritus at a graduate center for biomedical engineering and also worked as a consultant in the field of biomechanics and mechanical engineering. Despite his impressive credentials, plaintiff failed to establish at the Daubert hearing any factual support for either of the expert's opinions that the defendant's lap belt unreasonably failed in a roll-over collision and that the lap belt's failure was a proximate cause of the plaintiff's injuries. Affirming on appeal the exclusion of the expert's opinion and the summary judgment, the Eighth Circuit explained:

the trial court was well within its discretion to rule out [plaintiff's expert] opinion, which was connected to existing data only by the ipse dixit, or bare assertion, of the expert. . . . Where the proffered expert offers nothing more than a "bottom line" conclusion, he does not assist the trier of fact.

Although the court permitted the expert in handwriting analysis to explain to the jury the points of comparison between the known writings of the defendant and the questioned documents, the court excluded the expert's opinion testimony that the defendant was the author of the threatening writings. The court explained that the methodology or technique of "forensic stylistics analysis" failed the

227. Id.
228. Id.
229. Id. (citation omitted).
230. Id. (citation omitted).
231. Id.
232. 192 F.3d 750 (7th Cir. 1999).
233. Clark v. Takata Corp., 192 F.3d 750, 753 (7th Cir. 1999).
234. Clark, 192 F.3d at 754 n.2.
235. Id. at 759 (citing Joiner, 522 U.S. at 146).
Daubert tests for assessing reliability and, therefore, the expert's opinion depending thereon was inadmissible.236

The lesson of Jaurequi and Clark is clear. Counsel must make every effort to provide adequate factual support for expert testimony whenever challenged in a Daubert hearing. This is especially true because even if the trial court overrules a motion to exclude expert testimony, the court on appeal may reverse that decision. For example, the United States Court of Appeals for the Fifth Circuit in Tanner v. Westbrook,237 a medical malpractice case, held that the court should have granted defendant's pretrial motion to exclude a physician's unsupported opinion that the child's cerebral palsy was caused by birth asphyxia.238 During the pretrial hearing the defense offered an expert's affidavit and scientific literature suggesting that cerebral palsy is rarely caused by birth asphyxia.239 The plaintiffs countered with excerpts from their experts' depositions, supporting expert affidavits and supporting literature challenging, but not eliminating, the likelihood of a congenital defect as the cause of the cerebral palsy in this case.240 On appeal, the Fifth Circuit held that the plaintiff's expert "did not have the kind of specialized knowledge required to testify regarding causation, nor did he rely upon medical literature directly addressing the issue in this case. This deficiency rendered his expert testimony as to a critical issue in the case-causation-unreliable."241

702[D.5.b.ii]Daubert in the Context of a Motion for Summary Judgment Unaccompanied by a Rule 104(a) Motion in Limine or Motion to Exclude

In many cases, an adverse Daubert ruling is outcome determinative. Accordingly, many Daubert hearings are accompanied by a motion for summary judgment. However, a motion for summary judgment, partially dependent upon excluding expert testimony that is unaccompanied by a pretrial Daubert evidentiary hearing, is generally an inappropriate way to challenge the admissibility of expert testimony upon which the motion for summary judgment depends.

For example, the United States Court of Appeals for the Third Circuit in Padillas v. Stork-Gamco, Inc.,242 reversed and remanded when the district court excluded an expert report and granted a summary judgment without giving the proponent of the expert testimony

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236. Van Wyk, 83 F. Supp. 2d at 520.
237. 174 F.3d 542 (5th Cir. 1999).
238. Tanner v. Westbrook, 174 F.3d 542, 548 (5th Cir. 1999).
239. Tanner, 174 F.3d at 547.
240. Id. at 548.
241. Id.
242. 186 F.3d 412 (3d Cir. 1999).
an opportunity to establish foundational support for the expert opinion in a Daubert hearing. The action involved a products liability claim arising out of an injury to Daniel Padillas when he was injured while washing down a machine designed to separate chicken drumsticks from the thigh. The defendant moved for a summary judgment, without requesting a Daubert hearing on the key evidentiary issue. Rather than moving in response to defendant's motion for summary judgment for a Daubert hearing to review the admissibility of the testimony of plaintiff's expert, the plaintiff tendered a report by a mechanical engineer in opposition to defendant's motion for summary judgment. The plaintiff's expert concluded in his report that defendant's failure to provide a guard on the cutting machine "resulted in a defective machine with a dangerous and hazardous condition that was the cause of the accident." The trial court excluded the report and granted defendant's motion for summary judgment. Suggesting that the rigors of Daubert applied to technical expert evidence (anticipating Kumho), the court excluded the report because the expert offered no basis for the conclusion and observations reached in the report.

Reversing on appeal, the United States Court of Appeals for the Third Circuit stated: "Our concern is with the process by which the court arrived at its conclusion. . . . We have long stressed the importance of in limine hearings under Rule 104(a) in making the reliability determination required under Rule 702 and Daubert." The court explained that if the trial court was concerned with the factual basis of the expert's report "it should have held an in limine hearing to assess the admissibility of the [report], giving plaintiff an opportunity to respond to the court's concerns." The court concluded that "given the complex factual inquiry required by Daubert, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record." Even though the plaintiff failed to request a Rule 104 Daubert hearing, the court held that the district court had abused its discretion in ruling on the admissibility of

244. Padillas, 186 F.3d at 414.
245. Id.
246. Id.
247. Id. at 416.
248. Id. at 414.
249. Id. at 416.
250. Id. at 417.
251. Id. at 418 (quoting Petruzzi's IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1240 (3d Cir. 1993)).
252. Id. at 418 (quoting Cortes-Irizarry v. Corporacion Insular de Seguros, 111 F.3d 184, 188 (1st Cir. 1997)).
proffered expert testimony in the summary judgment context without the benefit of a *Daubert* hearing.\textsuperscript{253}

The unfairness of a *Daubert* challenge in the context of a motion for summary judgment unaccompanied by a *Daubert* hearing can also be illustrated by the trial court's opinion in *Friedman v. Cunard Line Limited*.\textsuperscript{254} In *Friedman*, the trial judge refused to consider a "gatekeeping" challenge to the competency of a physical education, recreation, and sports safety expert, when the objections were raised for the first time in a reply brief on a motion for summary judgment. The court explained:

> [t]he proper vehicle for testing the admissibility of an expert's opinion is a motion *in limine* to preclude the testimony. Such a motion requires the district court to perform its "gatekeeper" function under *Daubert v. Merrill Dow Pharmaceuticals, Inc.* . . . and determine whether or not Rule 702 . . . would allow the opinion evidence [that the recreational facilities of a cruise ship created a dangerous environment] to be adduced at trial.\textsuperscript{255}

Accordingly, if counsel believes summary judgment is appropriate because the opponent's expert testimony cannot pass the *Daubert* test, then counsel should seek a motion in limine to consider the *Daubert* issue as a condition precedent to a successful motion for summary judgment. The *Daubert* hearing will provide the appropriate contexts for considering the expert's competency to lay the foundation for the scientific theory or principle, the methodology or instrument, and the application in the particular case.

\textbf{702[D.5.b.iii] The *Daubert* Hearing During the Course of a Trial as Part of a Rule 702 Objection}

Although, ideally, a *Daubert* hearing should occur pursuant to a pretrial motion in limine, trial judges may also conduct a *Daubert* hearing during the course of a trial, especially if the challenge goes to the expert's factual conclusions rather than the theory or methodology. If the *Daubert* issue arises during the course of the trial, counsel should be wary of two practical problems that accompany the introduction of any expert testimony.

First, in proffering an expert opinion on direct, counsel should be wary about opening the door to the introduction of evidence on cross-examination that otherwise may not have been admissible. For exam-

\begin{itemize}
  \item \textsuperscript{253} Id. at 418.
  \item \textsuperscript{254} 1997 WL 698184 (S.D.N.Y. 1997).
  \item \textsuperscript{255} *Friedman v. Cunard Line Ltd.*, No. 95 Civ. 5232, 1997 WL 698184, at *3 (S.D.N.Y. 1997).
\end{itemize}
ple, in *State v. Hankins*,256 Hankins was charged with murdering three individuals by beating them with a steel bar measuring thirty-one inches and weighing five pounds.257 During cross-examination of the defendant's psychiatrist, who testified on direct that at the time of the crimes Hankins was legally insane, the State asked whether the psychiatrist was aware that a month prior to the killings the defendant had used a winch bar to damage a vehicle.258 The defense argued on appeal that such a question was intended to introduce to the jury inadmissible character evidence.259 The Nebraska Supreme Court affirmed the trial court's admission of the question stating that an expert may be cross-examined for the purposes of testing and inquiring into the basis for his or her opinion. Such examination is useful to the jury in assessing the probative value of the expert's opinion. As we have previously noted, cross-examination is proper as to anything tending to affect the accuracy, veracity, or credibility of a witness, and anything within the knowledge of a witness tending to rebut evidence given on direct examination is admissible as a matter of right on cross-examination. Moreover, the scope of cross-examination of a witness rests in the discretion of the trial court, and its ruling will be upheld on appeal unless there is an abuse of discretion.260

Second, if an expert opinion is elicited for the first time on cross-examination and no objection is made to the adequacy of the foundation underlying the opinion, then on appeal counsel will be deemed to have waived any foundational objection. This has been held true outside the *Daubert* context and there is little practical reason to assume it will not extend to *Daubert* challenged testimony. For example, in *Uryasz v. Archbishop Bergan Mercy Hospital*,261 the defendant on appeal challenged the foundational adequacy of expert testimony from both the treating and consulting physicians regarding the cause of numbness in plaintiff's leg.262 With regard to the opinion of the consulting physician, the Court held, "[m]ost of the testimony [the consulting physician] gave regarding the cause of the numbness was elicited on cross-examination. The detailed cross-examination of [the consulting physician] waived any objection defendant may have had to

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258. *Hankins*, 232 Neb. at 630, 441 N.W.2d at 872.
259. *Id.*
260. *Id.* 631, 441 N.W.2d at 872 (citation omitted).
Accordingly, a cross-examiner should avoid eliciting unfavorable opinions that have not been raised on direct, and should be aware that one of the purposes of cross-examination is to challenge the adequacy of the underlying foundation for any opinions given on direct or cross-examination.

Apart from these practical considerations, the federal courts have regularly entertained Daubert objections during the course of the trial. For example, the United States Court of Appeals for the Fifth Circuit in Curtis v. M&S Petroleum, Inc.,264 considered on appeal in this toxic tort case whether the trial court had properly excluded expert testimony proffered during a Daubert hearing conducted outside the presence of the jury during the course of the trial.265 During the Daubert hearing the plaintiff's proffered expert testimony of an industrial hygienist who testified that in his expert opinion the health problems of the plaintiff refinery workers were caused by their exposure to an excessive amount of benzene during their employment at defendant's refinery.266 The trial court excluded the expert's causation testimony, holding that his factual conclusion on causation did not satisfy the reliability rigors of Daubert because he could not establish the precise level of benzene to which the workers had been exposed.267

On appeal, the Fifth Circuit held that the trial judge had abused his discretion in excluding the expert's opinion under Daubert.268 Without criticizing the court's holding of the Daubert hearing during the course of the trial, the Fifth Circuit explained that the expert's testimony that (1) the symptoms experienced by the workers were consistent with overexposure to benzene; (2) tests performed by the workers indicated excessive exposure to benzene; (3) the work practices at the refinery created high risks for exposure; (4) the refinery had not been designed to handle toxic chemicals such as benzene; and (5) medical literature relied upon by the expert established a connection between exposure to high levels of benzene and the types of symptoms experienced by plaintiffs, all established ample foundational bases for the expert's causation opinion.269 As a result, the court's exclusion of the testimony based upon the expert's inability to establish the exact levels of benzene exposure constituted an abuse of discretion.270 Ac-
Accordingly, the Fifth Circuit reversed and remanded the trial court's granting of defendant's motion for judgment as a matter of law.271

While a Daubert hearing outside the presence of the jury would be an appropriate procedure for considering the admissibility of expert testimony, if the case is being tried to the court then the court may be more likely to hear the evidence during the course of the trial before deciding whether to exclude it under Daubert and Kumho. For example, the court in Smith v. Rasmussen,272 a bench trial, permitted defendant's general psychiatrist to testify that sex reassignment surgery was "controversial" or "experimental" rather than "medically necessary," subject to plaintiff's motion to exclude the expert testimony.273 After hearing the testimony, the court granted plaintiff's motion to exclude the expert's testimony on competency grounds, reasoning that the generally qualified psychiatrist lacked particular knowledge and experience in the pertinent inquiry at issue, "the diagnosis and treatment of gender identity disorder."274

702[D.5.b.iv] Post-Verdict Daubert Motions to Exclude Accompanied by a Motion for Judgment as a Matter of Law

Although a trial court would normally resolve a Daubert challenge either in response to a pretrial motion in limine or as a consequence of a Rule 702 objection raised during the course of the trial, if the challenge is denied or the judge reserves a Daubert ruling until the end of the case, then counsel should renew the objection as part of a motion for judgment as a matter of law. If this motion is denied and the jury returns an unfavorable verdict that depends upon the challenged expert testimony, then counsel should renew the motion for judgment as a matter of law.

Several cases illustrate the importance of continuing to preserve the Daubert issue throughout the trial. In Comer v. American Electric Power,275 a products liability case, a homeowner sued an electric utility after suffering property damage in a house fire.276 The homeowner alleged that a "voltage surge" caused by a defective connection on the transformer that serviced the house caused the fire in plaintiff's home.277 The plaintiff, in support of his claim, offered the expert testimony of an electrical engineer who testified on the issue of causa-

271. Id. at 672, 676.
274. Smith, 57 F. Supp. 2d at 766.
275. 63 F. Supp. 2d 927 (N.D. Ind. 1999).
277. Comer, 63 F. Supp. 2d at 931-32.
On cross-examination, the defendant challenged the factual foundation for the expert’s opinion and unsuccessfully moved for the exclusion of the expert’s testimony. At the close of plaintiff’s case, the defendant moved under Federal Rule of Civil Procedure 50(a)(1) for a judgment as a matter of law, renewing his argument that the expert’s testimony should be excluded based upon the inadequacy of the factual support for his opinion. The court took the motion under advisement. At the close of all the evidence, the defendant renewed the motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(a)(2). Again, the court took the motion under advisement and submitted the case to the jury. After the jury returned a verdict in favor of plaintiff, the court directed the parties to brief the issues raised by defendant’s motion, especially the Daubert issue.

The first issue the court addressed was the standard of review. The court acknowledged that ordinarily in reviewing a motion for judgment as a matter of law following a jury verdict under Fed.R.Civ.P. 50, the evidence is viewed “in the light most favorable to the nonmoving party...” However, the court reasoned, the standard of review with respect to the admissibility of expert testimony is abuse of discretion. Finding that plaintiff’s expert opinion “is not based upon any particular evidence or trained observation, but represents mere subjective belief and unsupported speculation,” the court granted defendant’s motion for judgment as a matter of law and directed the clerk to enter judgment for the defendant. The court, in effect, made the same ruling that could have been made in a pre-trial motion, but was reserved until after a verdict was granted. This approach may be most common in those cases, such as Comer, where the Daubert deficiency comes by way of factual conclusions reached by the expert, rather than the theory or methodology relied upon by the expert. Given the fact that the Supreme Court in Weisgram upheld the authority of an appellate court to make the same decision on appeal, it makes sense that the trial judge has authority to do likewise even against a jury verdict that has found the testimony sufficiently credible on which to base a verdict.

278. Id. at 931.
279. Id. at 932.
280. Id. at 930.
281. Id.
282. Id.
283. Id. at 931 (citing Joiner, 522 U.S. at 136; Kumho, 526 U.S. at 151).
284. Id. at 934.
285. Id. at 941.
The United States Court of Appeals for the Eighth Circuit approved of this procedure in *Blue Dane Simmental Corp. v. American Simmental Ass'n*. In *Blue Dane*, the Eighth Circuit upheld the district court's ruling excluding plaintiff's damage expert and granting the defendant a judgment as a matter of law after a nine-day jury trial. Although the properly qualified economist had appropriately used a "before-and-after modeling" for calculating damages, the court held that because the expert had failed to input all the relevant independent variables that might have affected a change in the value of a breed, the expert's factual conclusions on damages were insufficiently reliable to satisfy *Daubert* and *Kumho*. These cases illustrate the authority of the trial judge to take away from the jury their fact-finding responsibility with respect to the reliability of an expert's conclusions, notwithstanding the dicta in *Daubert* (and *Schafersman*) to the contrary. They also make it clear that counsel should renew the *Daubert* challenge at the end of the trial even if the court has either reserved or denied an earlier ruling.

702[D.5.b.v] Daubert Issues in the Context of Appellate Review

One important lesson is clear, that the *Daubert* ruling can be reviewed on appeal even though it will be reviewed on a *Joiner* abuse of discretion standard. Although cases decided since *Kumho* reveal that appellate courts are deferential to a trial court's *Daubert* determination, appellate courts have reversed lower court rulings both admitting and excluding expert evidence. Cases decided since *Kumho*, finding an abuse of discretion in the lower court's *Daubert* ruling, have variously (1) applied the harmless error doctrine to erroneous expert evidence rulings; (2) reversed and remanded for a new trial where appropriate; and (3) directed the entry of a judgment contrary to the lower court's judgment without remanding.

702[D.5.b.v.a] Affirm: *Joiner's* Abuse of Discretion Standard
702[D.5.b.v.b] Harmless Error

As with many other evidentiary errors, the appellate court may always find that the admission or exclusion of expert testimony in the court below constituted harmless error. For example, the United States Court of Appeals for the Tenth Circuit in *United States v. Charley*, concluded that the trial court had erred in permitting a physi-

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286. 178 F.3d 1035 (8th Cir. 1999).
287. *Blue Dane Simmental Corp. v American Simmental Ass'n*, 178 F.3d 1035, 1039, 1043 (8th Cir. 1999).
288. *Blue Dane*, 178 F.3d at 1040.
289. See infra notes 297-299 and accompanying text.
290. 189 F.3d 1251 (10th Cir. 1999).
cian, without adequate foundation, to give an unconditional opinion in a sexual assault case that each of the child complainants had been sexually abused. Nonetheless, the court held the error to be harmless. The court explained that while the challenged physician was "merely vouching for the credibility of the child complainants" (an improper subject matter for experts), the error had been harmless because other experts had properly testified that the symptoms exhibited by the child complainants were consistent with sexual abuse, leaving the issue of whether the child had in fact been abused for the trier of fact.

Similarly, the United States Court of Appeals for the Sixth Circuit held in *Greenwell v. Boatwright*, that the trial court had erred in permitting defendant's accident reconstructionist to testify that eyewitness testimony about accidents is unreliable (an improper subject matter for experts), but held the error harmless because the expert's testimony focused primarily on the physical evidence supporting the expert's testimony that contradicted some eyewitness accounts.

702[D.5.b.v.c] Reverse and Remand

In many cases the decisions to either admit or exclude expert testimony is outcome determinative and, therefore, beyond the doctrine of harmless error. If so, a reviewing court finding such error will typically reverse and remand for further trial proceedings. For example, the United States Court of Appeals for the Fifth Circuit in *Tanner v. Westbrook*, vacated the judgment of the trial court and remanded for a new trial when the court erroneously admitted, without adequate foundation, the expert testimony of a physician regarding whether a child's cerebral palsy was caused by birth asphyxia.


To resolve a split of authority on the issue of whether an appellate court must automatically remand to the lower court for further proceedings if the appellate court reverses a *Daubert* ruling, the United

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292. *Charley*, 189 F.3d at 1273.
293. *Id.* at 1266.
294. *Id.* at 1271.
295. 184 F.3d 492 (6th Cir. 1999).
297. 174 F.3d 542 (5th Cir. 1999).
States Supreme Court recently addressed the issue in *Weisgram v. Marley Co.* The trial court admitted the expert testimony of three of plaintiff's witnesses who testified, over defendant's Daubert objection, that a defect in a heater manufactured by the defendant caused both the fire and Weisgram's death. In addition to objecting to plaintiff's expert testimony, the defendant at the close of Weisgram's evidence and again at the close of all the evidence moved for a judgment as a matter of law.

On appeal, the United States Court of Appeal for the Eighth Circuit reversed, reasoning that the expert testimony of Weisgram's expert witnesses should have been excluded as speculative. Rather than exercising their discretionary authority to remand under Rule 50(d) of the Federal Rules of Civil Procedure, in order to give the plaintiff an opportunity to present additional expert testimony, the Eighth Circuit directed a judgment as a matter of law against the jury verdict winner.

On appeal to the United States Supreme Court the plaintiff argued that under Rule 50(d) an appellate court may not enter judgment for the verdict loser when a trial court has excluded evidence, but must remand to consider whether a new trial is necessary. Affirming the Eighth Circuit's ruling, the United States Supreme Court held that following *Daubert* and *Kumho*, all parties have been put on notice of the "exacting standards of reliability" expert testimony must meet:

> It is implausible to suggest, post-*Daubert*, that parties will initially present less than their best expert evidence in the expectation of a second chance should their first try fail. We therefore find unconvincing Weisgram's fears that allowing courts of appeal to direct the entry of judgment for defendants will punish plaintiffs who could have shored up their cases by other means had they known their expert testimony would be found inadmissible.

*Weisgram*, therefore, puts counsel on notice that when the *Daubert* issue is addressed, whether at pretrial or during the trial, the foundational evidence proffered must be capable of not only persuad-
ing the trial court, but also any court on appeal. Winning the Rule 104(1) ruling of admissibility of expert testimony at trial does not mean that counsel may feel comfortable on appeal. The battle of admissibility must be won again on appeal, with the abuse of discretion standard providing some comfort, but clearly not a complete antidote.

**702[D.6] Scope of Daubert Questions**

If the Daubert issue remains alive and well throughout pretrial, trial, and appeal, then counsel must clearly provide foundation (or challenge the foundational adequacy) of all expert testimony. This is true on all foundational levels of (1) competency, (2) theory, (3) methodology and (4) application or conclusion.

**702[D.6.a] Competency**

The first foundational requirement of any expert testimony is that the witness is qualified to give specialized testimony that “will assist the trier of fact.” Typically, an expert’s testimony will assist the trier of fact if the testimony explains: (1) a relevant theory or principle; (2) the application of a theory or principle to a relevant methodology, technique, procedure or instrument for interpreting facts; or (3) the application of a technique or procedure to the evidence of the case. To these ends, Rule 702 of the Federal and Nebraska Rules of Evidence provides that a witness may be “qualified as an expert by knowledge, skill, experience, training or education. . .”307 The Nebraska Supreme Court in Reynolds explained that “[w]hether a witness is an expert under Neb. Evid. R. 702 depends on the factual basis or reality behind a witness’ title or underlying a witness’ claim to expertise.”308 In exercising the trial judge’s gate keeping responsibility under Rule 702, the trial court has broad discretion in not only determining the general competency issue, but also whether a particular subject matter is beyond the scope of the expert’s expertise.309 It should be noted

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308. Reynolds, 235 Neb. at 680, 457 N.W.2d at 417 (citing Jenkins v. United States, 307 F.2d 637 (D.C. Cir.1962)).
309. See, e.g., State v. Lopez, 249 Neb. 634, 643, 544 N.W.2d 845, 853 (1996) (upholding the trial judge’s ruling admitting defendant’s expert testimony regarding fingerprint analysis, tool marking and ballistics, while excluding further crime scene reconstruction testimony on the grounds that the witness had not been properly qualified as a crime scene reconstructionist); State v. Boppre, 234 Neb. 922, 929, 453 N.W.2d 406, 416, 432 (1990) (upholding the trial court’s ruling that a “forensic science consultant” who had studied the handwriting of vision-impaired people, was not qualified to testify whether the sighted victim could have written the white grease letters spelling “J-F-F-B-O-P-E” found near his body); Cassio v. Creighton Univ., 233 Neb. 160, 177-78, 446 N.W.2d 704, 715 (1989) (reversing because plaintiff’s scuba diving expert was permitted to testify beyond the scope of his expertise as to the cause of death).
that these broad provisions for qualifying witnesses under Rule 702 override separate licensing provisions which may appear to present a separate litmus test for the qualification of witnesses for occupational purposes.310

This preliminary issue of fact of expert qualification is for the trial judge under Rule 104(1) of the Nebraska Rules of Evidence and Rule 104(a) under the Federal Rules of Evidence.311 The Nebraska courts on some occasions have held that unless the trial court’s finding on competency is clearly erroneous, the qualification of an expert will not be reversed on appeal.312 On other occasions the Nebraska courts have announced an abuse of discretion standard for determining expert qualification issues.313 Whether the “clearly erroneous” standard

310. See, e.g., Hiway 20 Terminal, Inc. v. Tri-County Agri-Supply, Inc., 232 Neb. 763, 765, 443 N.W.2d 872, 874 (1989) (upholding qualification of expert witness to testify regarding the valuation of a damaged grain storage facility even though the witness was not a licensed appraiser under Nebraska Revised Statute, Section 81-8,286(1), which provided in relevant part, “No person shall testify as an appraiser before any tribunal, court, judge, referee, or judicial committee without being licensed . . .”); Lincoln Tel. & Tel. Co. v. County Bd. of Equalization, 209 Neb. 465, 474, 308 N.W.2d 515, 521 (1981) (rejecting the argument that having a real estate appraiser’s license is a necessary qualification for the valuing real property, and noting that “the valuation of public utilities, including telephone companies, calls for specialized knowledge that a person holding a real estate appraiser’s license would not necessarily have”). But see, the questionable authority of Floyd v. Worobec, 248 Neb. 605, 613, 537 N.W.2d 512, 517 (1995) (holding that the trial judge had not abused his discretion in excluding the expert testimony on causation from a chiropractor because the plaintiff had not offered evidence that the expert witness was a licensed chiropractor).


requires anything different from an “abuse of discretion” standard normally applied to Daubert expert evidence questions remains to be seen.

If a party believes that an opponent’s expert is not qualified, then counsel should specifically object on competency grounds rather than simply making a general foundational objection. If counsel believes the lack of qualification of the expert may be highlighted by a few well aimed questions, then counsel should ask the court for permission to voir dire the witness on foundation to highlight the alleged deficiencies. On the other hand, if the concern is merely over the comparative qualifications of the competing experts, counsel should expose the weaknesses of the opponent’s expert on cross examination and explain the opposing expert’s deficiencies during closing rather than challenging the witness’ competency through a voir dire examination because issues of comparative credibility are issues of weight that are “uniquely the province of the fact finder.”

It would not appear that Daubert changes these overall competency requirements for experts in Nebraska courts, but it may indirectly affect the issue by requiring that the expert be familiar with the types of questions engendered by Daubert. Pursuant to the trial court’s broad discretion in determining the expert qualification issue, the Nebraska Supreme Court has upheld the qualifications of experts from a broad range of topics including an art historian qualified to


316. Fransen v. Crossroads Joint Venture, 257 Neb. 597, 614-16, 599 N.W.2d 603, 615-17 (1999) (allowing a real estate appraiser to testify regarding the value of leasehold improvements); State ex rel. NSBA v. Miller, 258 Neb. 181, 196-97, 602 N.W.2d 486, 498 (1999) (permitting an attorney to testify as an expert regarding the excessiveness of a legal fee); Woollen v State, 256 Neb. 865, 891, 593 N.W.2d 729, 746 (1999) (permitting expert testimony from a civil engineer on whether a deeply rutted highway was the cause of an accident); State v. Thieszen, 252 Neb. 208, 219-21, 560 N.W.2d 800, 808-09 (1997) (permitting the interpretation of photographic evidence despite lack of formal training in the area of forensic interpretation of evidence); McArthur v. Papio-Missouri River NRD, 250 Neb. 96, 100-04, 547 N.W.2d 716, 721-23 (1996) (permitting a nonowner who was familiar with the condemned land’s characteristics and uses and had farmed it to testify as an expert as to value); Nelson v. Metro. Utilities Dist., 249 Neb. 956, 959, 547 N.W.2d 133, 136 (1996) (upholding the qualifications of a landowner familiar with the value of his land to testify as an expert regarding land values); Bristol v. Rasmussen, 249 Neb. 854, 864-65, 547 N.W.2d 120, 128 (1996) (upholding the expert testimony of a farmer regarding the number of acres affected by flooding caused by defendant’s negligence); McDonald v. Miller, 246 Neb. 144, 152 518 N.W.2d 80, 86 (1994) (upholding the qualifications of both an orthodontist to estimate the costs of fu-
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give testimony that otherwise obscene art possesses artistic value\textsuperscript{317} and a “retired burglar” qualified to give testimony regarding whether tools found in defendant’s possession were in fact tools commonly used to commit burglaries.\textsuperscript{318} Similarly, the Court has upheld trial court rulings excluding expert testimony on grounds of the inadequacy of

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Despite this broad discretion, the Nebraska Supreme Court has reversed the rulings both admitting and excluding expert testimony in cases where the Court has found an abuse of discretion.

While in most cases expert testimony is permissive rather than mandatory, the Nebraska Supreme Court has specifically held expert testimony may be required in certain types of cases as part of the prima facie case. For example, in medical, dental, and legal...
malpractice cases, the Court has consistently held that plaintiff as part of a prima facie case must introduce qualified expert testimony on the issues of both standard of care and whether the defendant professional followed the generally accepted and recognized standard of care or skill in the specific community\textsuperscript{325} or similar professional communities. One exception to this rule requiring mandatory expert testimony on the standard of care involves instances of negligence that are a matter of "common knowledge" where the "circumstances are such that the recognition of the alleged negligence may be presumed to be within the comprehension of laymen."\textsuperscript{326} Another exception is where a professional admits acts of negligence that are specific enough to eliminate the need for expert testimony on the issue.\textsuperscript{327} Expert testi-

\textsuperscript{323} See, e.g., Capps v. Manhart, 236 Neb. 16, 458 N.W.2d 742 (1990) (citations omitted) (finding a dentist trained at Creighton University who practiced in the suburbs of Chicago properly qualified to testify on the issue of breach of standard of due care, because the fact "the expert never practiced in the defendant's community goes to the weight to be accorded the evidence by the trier of fact; it does not keep the expert from testifying to a general standard of skill in the defendant's community if he testifies that he is familiar with that standard").

\textsuperscript{324} See, e.g., Rod Rehm, P.C. v. Tamarack Am., 261 Neb. 520, 532, 623 N.W.2d 690, 699 (2001) (finding no error in the trial court's admission of expert legal testimony regarding the standard of care for representation in a slip and fall case); Boyle v. Welsh, 256 Neb. 118, 129-32, 589 N.W.2d 118, 126-28 (1999) (reversing the court of appeals decision in Boyle v. Welsh, 6 Neb. App. 931, 938, 578 N.W.2d 496, 501 (1998) wherein the court of appeals held that expert testimony is not required to establish legal malpractice where counsel failed to file a medical malpractice action before the statute of limitations had run, the Court held that expert testimony is required to establish both an attorney's standard of conduct and whether the standard had been breached in determining whether the action should be filed at all).

\textsuperscript{325} See Robinson v. Bleicher, 251 Neb. 752, 759-60, 559 N.W.2d 473, 478-79 (1997) (noting that where informed consent is at issue, a locality standard is applicable, barring testimony of physicians who have no experience in the local community).

\textsuperscript{326} See, e.g., Halligan v. Cotton, 193 Neb. 331, 335, 227 N.W.2d 10, 12-13 (1979) (citation omitted); Boyd v. Chakraborty, 250 Neb. 575, 581-83, 550 N.W.2d 44, 48-49 (1996) (finding that the "common knowledge" exception applied where the physician left a tube fragment in the patient's lung). \textit{But see}, Boyle v. Welsh, 256 Neb. 118, 129, 589 N.W.2d 118, 126 (1999) (finding that expert testimony on whether a medical malpractice action should have been filed at all constitutes a prior question to a more commonly known insight than if you are going to file an action it should be done within the statute of limitations).

\textsuperscript{327} See, e.g., Fossett, 258 Neb. at 711, 605 N.W.2d at 471 (distinguishing, for purposes of illustrating the type of admission necessary to establish a breach of the standard of care by an admission, between those instances where a party may make a general admission of having made a mistake from the more specific and complete statement in this case where the defendant admitted: "I have punctured her duodenum. I made a false passage, I made a terrible mistake, I'm very very sorry. . . . No, it isn't [okay]. This shouldn't have happened").
mony may also be required by statute as a condition precedent for estab-
lishing certain special issues.\textsuperscript{328} For example, under federal
Indian Child Welfare Act Guidelines, "qualified expert testimony is
required in a parental rights termination case on the issue of whether
serious harm to the Indian child is likely to occur if the child is not
removed from the home."\textsuperscript{329}

While expert testimony may be necessary on certain subjects, it is
unessential on most issues even where intuitively it may be ex-
pected.\textsuperscript{330} Moreover, expert testimony may be inadmissible on some
subjects such as the meaning of law, a subject that will not "assist the
trier of fact" because it is an issue within the peculiar domain of the
judge. For similar reasons, "expert evidence is generally not admissi-
able as proof that the assistance of counsel in a criminal case was [con-
stitutionally] ineffective,"\textsuperscript{331} or that counsel improperly handled
certain evidentiary issues.\textsuperscript{332}

Fay, 246 Neb. 454, 519 N.W.2d 521 (1994)) ("Where the character of an alleged injury is
not objective, but, rather, subjective, the cause and extent of injury must be established
by expert medical testimony."); Tarvin v. Mut. of Omaha Ins. Co., 238 Neb. 851, 855,
472 N.W.2d 727, 731 (1991) (citations omitted) ("Unless the character of an injury is
objective, that is, an injury's nature and effect are plainly apparent, an injury is a sub-
jective condition, requiring an opinion by an expert to establish the causal relationship
between an incident and the injury... "); Eno v. Watkins, 229 Neb. 855, 858, 429 N.W.2d
371, 373 (1988) ("Where the claimed injuries are of such a character as to require skilled
and professional persons to determine the cause and extent thereof, the question is one
of science.").

\textsuperscript{329} In re C.W., 239 Neb. 817, 823-24, 479 N.W.2d 105, 111 (1992) (finding that a
certified clinical psychologist with extensive clinical research experience with children
satisfied the expert qualification requirements of the Indian Child Welfare Act despite
the fact that he had no experience or background with the Indian child's tribe or Indian
culture).

\textsuperscript{330} See Tipp-It, Inc. v. Conboy, 257 Neb. 219, 230, 596 N.W.2d 304, 312 (1999)
(noting in an obscenity case that a jury may ascertain the sense of the average person,
applying contemporary community standards without the benefit of expert evidence),
cert. denied, 528 U.S. 1116 (2000); Cords v. City of Lincoln, 249 Neb. 748, 756, 545
N.W.2d 112, 118 (1996) ("While expert witness testimony may be necessary to establish
the cause of a claimed injury, the Workers' Compensation Court does not need to de-
pend on expert testimony to determine the degree of disability but instead may rely on
the testimony of the claimant."); Luehring v. Tibbs Constr. Co., 235 Neb. 883, 888, 457
N.W.2d 815, 819 (1990) ("Once the cause of a disability has been established, this court
has allowed the compensation court to consider the testimony of the claimant. ... ").

\textsuperscript{331} State v. Ryan, 248 Neb. 405, 415, 534 N.W.2d 766, 776 (1995), cert denied, 529
Joubert, 235 Neb. 230, 455 N.W.2d 117 (1990); State v. Gagliano, 231 Neb. 911, 438
N.W.2d 783 (1989); State v. Ohler, 219 Neb. 840, 366 N.W.2d 771 (1985)).

\textsuperscript{332} Baker v. Fabian, Thilen & Thilen, 254 Neb. 697, 703, 578 N.W.2d 446, 451
(1998) (stating "the question whether an attorney breaches his or her duty of profes-
sional care to a client regarding evidentiary issues is a legal matter concerning which
judges are required to be their own experts; judging the law is one of the most important
judicial functions").
Once an expert is qualified under Rule 702, then the remaining Rule 702 foundational steps of theory, methodology and application become at issue. On each of these issues Schaferman's adoption of Daubert more clearly changes the foundational requirements for expert testimony.

702[D.6.b] Theory

Once an expert has been qualified, the proponent of expert testimony must establish the reliability of the theory upon which the expert’s opinion depends. In many cases, the underlying theory upon which an expert’s testimony rests will not be at issue. However, when it is at issue, Daubert requires that the theory underlying the expert’s opinion must be supported by more than speculation or conjecture. Indeed, the foundational requirements of Daubert become essential and the availability of federal case law on various theories upon which expert testimony rests becomes important.

For example, the United States Court of Appeals for the Fifth Circuit in Black v. Food Lion, Inc.,333 reversed and remanded a $300,000 verdict in a slip and fall case because the expert’s underlying theory that fibromyalgia may be caused by hormonal damage which may be caused by a traumatic event “has not... been verified by testing and, thus, has not been peer-reviewed.”334 The court explained that even though plaintiff’s physician followed a generally accepted medical methodology of ruling “out some known causes of disease in order to finalize a diagnosis,”335 the court concluded that “use of a general methodology cannot vindicate a conclusion for which there is no underlying medical support.”336

333. 171 F.3d 308 (5th Cir. 1999).
334. Black v. Food Lion, Inc., 171 F.3d 308, 313 (5th Cir. 1999). The court observed that the plaintiff’s expert attempted to offer recent studies indicating some link between physical trauma and fibromyalgia, but the studies were excluded because they “had not been properly produced to opposing counsel during discovery.” Black, 171 F.3d at 313 n. 3.
335. Id. at 314.
336. Id. The court in Hultberg v. Wal-Mart Stores, Inc., CIV. A. 97-2858, 1999 WL 244030, at *1 (E.D. La. 1999) granted defendant’s motion in limine to exclude expert testimony that a slip and fall may have been the cause of the plaintiff developing fibromyalgia. The court observed that while plaintiff noted that studies may now be available to support a causal link between a traumatic event and developing fibromyalgia, “without such evidence, however, this Court must follow the clear mandate set forth by the Fifth Circuit in Black v. Food Lion, Inc. less than a month ago.” Hultberg, 1999 WL 244030, at *1.
Deficiencies in Supporting Methodology or Standard Protocols in Operation

Once an expert has been qualified and the underlying theory has been established as sufficiently reliable to pass the Daubert tests, then the reliability of the methodology, standard protocols or instrument incorporating the expert theory becomes at issue. Indeed, one of the important messages of Kumho is that a qualified expert should not be permitted to testify unless the methodology, instrument or technique relied upon in forming the expert's opinion is shown to be reliable. Several cases decided at the federal level since Kumho have discussed the foundational importance of establishing the reliability of the expert's methodology.

For example, the court in American Tourmaline Fields v. International Paper Co.,337 granted defendant's motion to exclude a damage expert's testimony because of the unreliability of the mining engineer's methodology. Specifically, the plaintiff called an expert to testify regarding the amount and value of the gemstone tourmaline located within the leased property under dispute.338 In calculating the amount of the tourmaline, the expert relied upon a mathematical formula based upon previous production at the site.339 Although plaintiff's expert testified that both he and others had used the method for forty years to value mining prospects, the court excluded the testimony based upon the failure of the foundation to satisfy the Daubert factors.340 First, despite expert testimony that mining companies had relied upon the method for forty years, the court held that plaintiff "has failed to adduce sufficient evidence to satisfy its burden of establishing that [the expert's] methodology can be or has been tested."341 Second, while plaintiff's expert testified that his methodology had been the subject of several published articles, the court complained that plaintiff "has not provided the court with copies of these articles . . . or even tendered excerpts from any specific discussion about the methodology."342 Third, although the expert testified that his method had a 95% accuracy rate, the court observed that he "has not introduced any independent evidence that supports this assertion, and [the expert] did not elaborate on how he calculated the method's accuracy rate."343 Fourth, the expert did not mention any standards

340. Id. at *3, *5.
341. Id. at *4.
342. Id.
343. Id. at *5.
or controls for his methodology.\textsuperscript{344} Fifth, the expert failed to supply evidence that his methodology is generally accepted in the relevant scientific community.\textsuperscript{345} Accordingly, the court granted the defendant's motion to exclude the expert from testifying because of the failure to establish any of the \textit{Daubert} factors.\textsuperscript{346}

Similarly, the United States Court of Appeals for the Eighth Circuit decision in \textit{United States v. Iron Cloud},\textsuperscript{347} reversed and remanded a criminal case where the trial court improperly admitted the results of a portable breath test ("PBT") as evidence of intoxication.\textsuperscript{348} The court explained that no court has permitted the government to admit PBT test results for any purpose other than probable cause for arrest because of the inherent unreliability of the test.\textsuperscript{349}

Again in \textit{United States v. Van Wyk},\textsuperscript{350} the court excluded the opinion testimony of a handwriting expert as to the authorship of questioned "threatening" documents because of the insufficiency in the foundation of the reliability of the technique of "forensic stylistics."\textsuperscript{351} The court observed that while one published article recommended "forensic stylistics" as a reliable method for handwriting comparisons, the government could not meet its \textit{Daubert} burden that the methodology is generally accepted in the relevant expert area.\textsuperscript{352} Specifically, the proponent did not foundationally

- identify a known rate of error,
- establish what amount of samples is necessary for an expert to be able to reach a conclusion as to probability of authorship, or
- pinpoint any meaningful peer review. Additionally, . . . there is no universally recognized standard for certifying an individual as an expert in forensic stylistics.\textsuperscript{353}

Consequently, the court granted the defendant's motion in limine to the extent it requested that the expert's opinion as to the authorship of the writings be excluded.\textsuperscript{354}

In comparison, the United States Court of Appeals for the Fourth Circuit in \textit{Westberry v. Gislaved Gummi AB},\textsuperscript{355} against a \textit{Daubert} challenge, affirmed the relevance and reliability of a physician's cau-

\begin{itemize}
\item \textsuperscript{344} \textit{Id.}
\item \textsuperscript{345} \textit{Id.}
\item \textsuperscript{346} \textit{Id. at }*6.
\item \textsuperscript{347} 171 F.3d 587 (8th Cir. 1999).
\item \textsuperscript{348} United States v. Iron Cloud, 171 F.3d 587, 588 (8th Cir. 1999).
\item \textsuperscript{349} \textit{Iron Cloud}, 171 F.3d at 590.
\item \textsuperscript{350} 83 F. Supp. 2d 515 (D.N.J. 2000).
\item \textsuperscript{352} \textit{Van Wyk}, 83 F. Supp. 2d at 521.
\item \textsuperscript{353} \textit{Id. at }522.
\item \textsuperscript{354} \textit{Id. at }524.
\item \textsuperscript{355} 178 F.3d 257 (4th Cir. 1999).
\end{itemize}
sation opinion because the physician had relied upon the well established methodology of "differential diagnosis" or "differential etiology" in forming his opinion. The causation issue in Westberry was whether talcum powder the defendant placed on rubber gaskets it manufactured caused plaintiff's serious sinus problems. During the trial, the defendant unsuccessfully objected to plaintiff's expert physician giving testimony that "the sinus problems experienced by Westberry were caused by the inhalation of airborne talc in the workplace." On appeal, the defendant argued that the testimony of plaintiff's expert should have been excluded under Daubert because plaintiff's expert "had no epidemiological studies, no peer-reviewed published studies, no animal studies, no laboratory data to support a conclusion that the inhalation of talc caused Westberry's sinus disease."

Affirming the admission of the testimony, the Fourth Circuit explained that "[d]ifferential diagnosis, or differential etiology, is a standard scientific technique of identifying the cause of a medical problem by eliminating the likely causes until the most probable one is isolated." Indeed, the court observed that differential diagnosis as a methodology for identifying the cause of a medical problem has "widespread acceptance in the medical community, has been subject to peer review, and does not frequently lead to incorrect results." Consequently, the trial court had not erred in permitting the expert to rely upon a differential diagnosis in forming his opinion on causation.

The court's approval of the methodology of "differential diagnosis" in Westberry is consistent with the Nebraska Supreme Court's criticism of the expert's opinion in Schafersman, which was deemed unreliable, in part, because the expert had not conducted a differential diagnosis to rule out other possible causes for the illness the cows had suffered.

702[D.6.d] Application of the Theory or Methodology to the Facts of the Case

Nebraska cases preceding Schafersman tended to treat expert evidentiary issues going to the conclusions drawn from reliable theories

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357. Westberry, 178 F.3d at 260.
358. Id. at 261.
359. Id. at 262.
360. Id. (citing Baker v. Dalkon Shield Claimants Trust, 156 F.3d 248, 252-53 (1st Cir. 1998)).
362. Id. at 266.
and methodologies as issues of weight for the jury. Following this tradition, the court in Schaferman suggested that the trial court's gatekeeping responsibility under Daubert does not extend beyond assessing the reliability of the underlying theory and methodology. If this is true, then Schaferman would not change Nebraska's existing practice. The Court in Schaferman specifically stated that "once the validity of the expert's reasoning or methodology has been satisfactorily established, any remaining questions regarding the manner in which that methodology was applied in a particular case will generally go to the weight of such evidence." Restated from the perspective of who decides the reliability issue under Daubert, once the reliability of the theory and methodology have been established under Rule 104(1) by the court, then the question remains who decides the reliability of the application of the theory and methodology to the facts of the instant case. Are the conclusions drawn from a reliable theory and methodology a 104(2) issue of conditional relevancy for the jury, or a Rule 104(1) issue for the court consistent with other expert evidence issues? While the language in Daubert and Schaferman provides some support for the view that the "conclusion" issue is for the trier of fact rather than the court, the distinction makes little sense and has not been supported by the post-Daubert federal cases.

The dicta in Schaferman that the court's gatekeeping role announced in Daubert does not apply to the conclusions of the expert, but rather to theory and methodology alone, comes from the Supreme Court's suggestion in Daubert that in evaluating the relevancy and reliability of expert testimony, the trial court's "focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." By placing the "focus" on theory and methodology, the Court implied that the relevancy and reliability of factual applications to established scientific theories and methodologies were more

363. Palmer v. Forney, 230 Neb. 1, 7-8, 429 N.W.2d 712, 716 (1988) ("Unless the conclusions of an expert are based on factors that a court knows are wrong, as a matter of widespread, accepted, public knowledge, a court cannot say that the conclusions of the expert are wrong as a matter of law. The determination of the truthfulness or accuracy of an expert's conclusions is for the jury."); Danielsen v. Richards Mfg. Co., 206 Neb. 676, 684-94 N.W.2d 858, 862 (1980) (finding the foundational adequacy of the expert's opinion "a matter for the jury to decide in weighing the testimony"). Even following Justice Gerrard's concurring opinion in Phillips, suggesting for the first time that Nebraska should adopt the Daubert standard, the court in Snyder v. Contemporary Obstetrics & Gyn., 258 Neb. 643, 648, 605 N.W.2d 782, 789 (2000) stated that the lack of certainty of a qualified expert's opinion applying an acceptable theory and methodology "does not implicate the issues raised" in Justice Gerrard's concurring opinion in Phillips, 257 Neb. 256, 597 N.W.2d 377, 386. Snyder, 258 Neb. at 652, 605 N.W.2d at 791 (2000).

364. Schaferman, 262 Neb. at 233, 631 N.W.2d at 877 (emphasis in original).

365. Daubert, 509 U.S. at 595.
properly the domain of the jury. Once a court has accepted the reliability of such theories as the uniqueness of fingerprints or DNA markers and the availability of established protocol for classifying or matching fingerprints or DNA samples, the court has exhausted its gate keeping responsibilities and must defer to the jury regarding whether these theories and methodologies have been properly applied to the facts of the case. Following this approach, experts qualified to testify regarding fingerprint or DNA identification should be allowed to offer their identification opinions, leaving the credibility of their opinions to the rigors of the adversarial system acknowledged by Justice Blackmun in Daubert. However, this view has received some, but not complete support by the post-Daubert cases.

702[D.6.d.i] Conclusions as a Jury Issue Beyond the Foundational Requirements of Daubert

The deference many courts grant to the conclusions drawn by experts from reliable theories and methodologies, consistent with the Daubert dicta, can be seen in United States v. Nichols. In Nichols, a case involving expert testimony from the Oklahoma City bombing, the defendant on appeal argued that the trial court erred in refusing to hold a Rule 104(a) hearing to test the reliability of the expert's conclusions. Affirming on appeal, the United States Court of Appeals for the Tenth Circuit held that questions regarding compliance with valid protocols were matters "involving the credibility of witnesses and weighing of the evidence, both of which were more suitable for resolution by the jury." Similarly, the United States Court of Appeals for the Fourth Circuit in Westberry v. Gislaved Gummi AB, upheld the admissibility of a physician's conclusions that high levels of airborne talc in defendant's workplace had caused the workers' illnesses despite defendant's Daubert objection that the expert's "differential diagnosis" had neither "ruled out" other potential causes or "ruled in" the possibility of airborne talc in the workplace as the actual cause. In deferring to the jury for the reliability of the conclusions drawn from expert opinion, the court explained "[a] medical expert's causation conclusion should

366. Id. at 595-96.
367. 169 F.3d 1255 (10th Cir. 1999). See discussion of case, supra notes 216-219 and accompanying text.
368. United States v. Nichols, 169 F.3d 1255, 1262 (10th Cir. 1999).
370. 178 F.3d 257 (4th Cir. 1999).
not be excluded because he or she has failed to rule out every possible alternative cause of a plaintiff's illness." Similarly, while plaintiff's expert had no scientific studies or literature establishing talc as a possible explanation of plaintiff's sinus condition, it was established that "inhalation of high levels of talc irritates mucous membranes" and that defendant's workplace did in fact expose workers to high levels of airborne talc. Accordingly, plaintiff's expert testimony was sufficiently reliable to be admissible on the issue of causation, leaving the issue of weight to the jury.

702[D.6.d.ii] Conclusions as a Foundational Issue for the Court Under Daubert

Whatever the Court had in mind by the theory-and-methodology-but-not-conclusions dictum contained in Daubert and followed in Nichols and Westberry, the distinction has not always been followed by the federal courts under Daubert. Indeed, any such distinction has proven illusory at best. The Supreme Court in Joiner first observed that while Daubert implied that the court's gate keeping focus should be on theory and methodology, the reality is that "conclusions and methodology are not entirely distinct from one another," and that "[t]rained experts commonly extrapolate from existing data." The Court in Joiner further observed: "nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert."

Following Joiner and Kumho, many courts have subjected the factual conclusions of experts, as well as their theories and methodologies, to Daubert's relevance and reliability standards. If a court believes that an expert's conclusions lack adequate foundational basis, the court should permit the proponent to make an offer of proof of the basis of the conclusions in a Daubert hearing. For example, the United States Court of Appeals for the Third Circuit in Padillas v. Stork-Gamco, Inc. reversed and remanded when the district court excluded on factual foundational grounds an expert report and granted a summary judgment without the benefit of a Daubert hearing. The court explained that if the trial court was concerned with the factual basis of the expert's report "it should have held an in

372. Westberry, 178 F.3d at 265 (quoting Heller v. Shaw Indus., Inc., 167 F.3d 146, 156 (3d Cir. 1999)).
373. Id. at 264.
375. Joiner, 522 U.S. at 146.
376. 186 F.3d 412 (3d Cir. 1999).
limine hearing to assess the admissibility of the [report],’ giving plaintiff an opportunity to respond to the court’s concerns.”378 The court concluded that “[g]iven the complex factual inquiry required by Daubert, courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record.”379

If the proponent of expert testimony is unable to provide an adequate factual foundation for the conclusions drawn by the expert during the Daubert hearing, whether conducted at a pretrial hearing or during the trial, the court should exclude the testimony as unreliable. For example, in Oglesby v. General Motors Corp.,380 a products liability case, the United States Court of Appeals for the Fourth Circuit affirmed the trial court’s exclusion of expert testimony even though the exclusion was wholly based upon the unreliability of the expert’s factual foundation.381 The plaintiff, an automobile mechanic, argued that the defective manufacture of defendant’s radiator hose caused plaintiff’s burn injuries when it detached as he was adjusting a transmission cable on a pickup truck.382 In opposition to defendant’s motion for summary judgment, plaintiff offered the deposition testimony of an expert mechanical engineer who offered the opinion that the radiator hose had detached from the radiator because a defect in the “plastic” round connector that attached the hose to the radiator.383 The expert expressed an opinion that mishandling of the connector during the manufacturing process had caused it to become flattened oval (out-of-round), causing the hose to unloosen over time and eventually leading to the detachment that scalded the plaintiff.384 Although the trial court ruled (pre Kumho) that the engineer’s testimony would not be subject to the rigors of Daubert, the court nonetheless excluded his testimony because of the insufficiency of the factual foundation supporting his opinion that the connector contained a manufacturing defect.385

Affirming on appeal, the United States Court of Appeals for the Fourth Circuit held that even though the trial court had erred in assuming that the rigors of Daubert did not apply to the testimony of engineers (contrary to the subsequent holding in Kumho), the court had nonetheless properly excluded plaintiff’s expert testimony be-

378. Padillas,186 F.3d at 418 (quoting Petruzzi’s IGA Supermarkets, Inc. v. Darling-Delaware Co., 998 F.2d 1224, 1240 (3d Cir. 1993)).
379. Id. at 418 (quoting Cortes-Irizarry v. Corporacion Insular de Seguros, 111 F.3d 184, 188 (1st Cir. 1997)).
380. 190 F.3d 244 (4th Cir. 1999).
382. Oglesby, 190 F.3d at 246.
383. Id. at 248.
384. Id.
385. Id. at 248-49.
cause it lacked factual support.\textsuperscript{386} That is, while the court had no problem with the expert's methodology of applying mechanical engineering principles to explain why the radiator hose had disconnected, his failure to connect up his theory with the facts of the case made his opinion factually unsupportable. Specifically, the court observed that the expert (1) had not discovered how the part was manufactured, (2) had misidentified the material out of which the connector had been made as "thermostatic plastic" when it was in fact "nylon composite, glass filled," and (3) had not conducted any meaningful testing or analysis.\textsuperscript{387} Due to these inadequacies, the expert's opinion should have been excluded because he had not done his homework on the facts of the case.

Again, the United States Court of Appeals for the Eighth Circuit decision in \textit{Jaurequi v. Carter Manufacturing Co.},\textsuperscript{388} affirmed the trial court's exclusion of expert testimony lacking an adequate factual foundation. In this products liability case in which the plaintiff's legs had been amputated in an accident with a combine manufactured by John Deere, the plaintiffs' experts proposed giving testimony that the combine had design and warning defects that were causally responsible for plaintiff's injuries.\textsuperscript{389} However, both of plaintiffs' experts admitted in their respective depositions that they neither had any basis for their respective beliefs that alternative warnings would have made any difference, nor any basis for the feasibility of their alternative design proposals.\textsuperscript{390} Accordingly, the district court excluded their opinions on the basis of the paucity of the factual support of either expert's opinion and the Eighth Circuit affirmed.\textsuperscript{391} Even more extreme examples of courts taking away from the jury the decision as to whether the expert has sufficient factual support for the proffered expert testimony can be illustrated by \textit{Comer v. American Electric Power}\textsuperscript{392} and \textit{Blue Dane Simmental Corp. v. American Simmental Ass'n.}\textsuperscript{393} In \textit{Comer}, after the jury had found the expert's testimony compelling and had rendered a verdict dependent thereon in favor of plaintiff, the court excluded the expert's testimony and granted defendant's motion for judgment as a matter of law.\textsuperscript{394} The court explained that the expert's opinions "lack[ed] a reliable factual foundation."\textsuperscript{395} Contrary to

\textsuperscript{386} \textit{Id.} at 251.
\textsuperscript{387} \textit{Id.} at 250-51.
\textsuperscript{388} 173 F.3d 1076 (8th Cir. 1999).
\textsuperscript{389} \textit{Jaurequi v. Carter Mfg. Co.}, 173 F.3d 1076, 1078 (8th Cir. 1999).
\textsuperscript{390} \textit{Jaurequi}, 173 F.3d at 1080-81.
\textsuperscript{391} \textit{Id.} at 1078.
\textsuperscript{392} 63 F. Supp. 2d 927 (N.D. Ind. 1999).
\textsuperscript{393} 178 F.3d 1035 (8th Cir. 1999).
\textsuperscript{395} \textit{Oglesby}, 190 F.3d at 251.
plaintiffs suggestion that a court's review of an expert's opinion is limited to the reliability of the theory or methodology, the court expressed the view that "Rule 702 requires the district court to review the reliability of an expert's conclusions when appropriate."396 As applied to the expert's testimony, the court expressed disdain for the expert's willingness to change his opinion upon the suggestion of counsel.397 The court also criticized the expert's "conclusory suppositions" that lacked any foundational support.398 Finding that plaintiff's expert opinion "is not based upon any particular evidence or trained observation, but represents mere subjective belief and unsupported speculation,"399 the court granted defendant's motion for judgment as a matter of law and entered judgment for the defendant.400 In Blue Dane, the trial court excluded plaintiffs economist's damage testimony and granted a judgment as a matter of law after a nine-day jury trial because while the expert used an acceptable "before-and-after modeling" for calculating damages, he failed to input all the relevant independent variables that might have affected a change in the value of a breed.401

Many other courts since Kumho have excluded the opinion testimony of qualified experts relying upon reliable methodologies where their conclusions were not supported by adequate factual foundation.402

396. Comer, 63 F. Supp. 2d at 934.
397. Id. at 935.
398. Id. at 936.
399. Id. at 934.
400. Id. at 941.
402. See, e.g., Clark v. Takata Corp., 192 F.3d 750, 757 (7th Cir. 1999) (holding that the testimony of a Ph.D. mechanical engineer and a consultant in the field of biomechanics and mechanical engineering should have been excluded because the expert had formed his opinions that the defendant's lap belt unreasonably failed in a roll-over collision and that the lap belt's failure was a proximate cause of the plaintiff's injuries without the support of any testing or engineering analysis of the facts in the case); United States v. Charley, 189 F.3d 1261, 1264 (10th Cir. 1999) (holding that the court had committed harmless error in permitting a physician, without sufficient foundation in the medical evidence, to give an opinion in a sexual assault case as to whether the assaults had occurred), cert. denied, 528 U.S. 1098 (2000); Huey v. United Parcel Service, Inc., 165 F.3d 1084, 1086-87 (7th Cir. 1999) (holding that the testimony of a forensic vocational expert who formed an opinion that the plaintiff had been discharged in retaliation for race discrimination complaints should have been excluded because the opinion lacked any statistical analysis, any study of the employer's personnel files, or any attempt to reconstruct the underlying facts to determine the cause of the firing).
702[D.7] 403 Balancing and Daubert

The Nebraska Supreme Court in its foundational outline in State v. Houser,403 included a Rule 403 foundational step, balancing probative value against prejudicial effect.404 This step provided the Nebraska courts with the flexibility to exclude unreliable expert testimony even if the testimony otherwise satisfied Frye. The added step made Nebraska's Frye-plus standard more analogous to the Daubert standard in practice than in theory.

The broader scope of the Daubert standards, together with the acknowledgment that the four-part standards are advisory rather than exclusive, makes it less likely that any court will need to resort to Rule 403 as a basis for excluding unreliable expert testimony. In the words of the United States Third Circuit Court of Appeals in In re Paoli R.R. Yard PCB Litig.,405 "there must be something particularly confusing about the scientific evidence at issue—something other than the general complexity of scientific evidence[,]" to make it inadmissible under Rule 403.406

702[D.8] Specific Examples of Scientific Evidence Issues and the Relevance of Schafersman

702[D.8.a] Theory and Methodology Established by Statute:

Once the expert has been qualified, then Daubert requires that the theory and methodology relied upon by the expert must be established as sufficiently reliable to pass the four-part Daubert test. In some cases the theory and methodology may be established by statute. Barring a constitutional challenge of the statute, if the theory and methodology may be established by statute, then the Daubert challenge may be urged only on qualification and application levels.

702[D.8.a.i] Tests for Determining Whether a Driver Is Under the Influence of Alcohol

Scientific tests for determining whether a driver is under the influence of alcohol, provide an example of scientific evidence where the underlying scientific theory and methodology can be established by statutory provision. For example, Nebraska Revised Statutes section 60-6,201 establishes the foundation for admitting evidence of chemical tests for intoxication. The statute provides that "(1) [a]ny test . . . if made in conformity with the requirements of this section, shall be..."
competent evidence" of driving under the influence of alcohol. The related statutory provisions establish sufficient reliability for admissibility of both (1) the scientific theory (that blood-alcohol content of a person can be scientifically determined and is relevant to driving under the influence) and (2) the types of tests and procedures (methodology) that are acceptable in determining blood-alcohol content. Working from these statutory provisions, the Court has announced and repeatedly admitted blood alcohol tests complying with four foundational steps keyed into the applicable statutes:

1. that the testing device was working properly at the time of the testing; 2. that the person administering the test was qualified and held a valid permit; 3. that the test was properly conducted under the methods stated by the Department of Health; and 4. that all other statutes were satisfied.

Of course compliance with these statutes only provides a prima facie basis for the admissibility of the test results, leaving the defendant free to challenge the reliability of any particular test result. For example, expert testimony may be admissible on whether such tests should be subject to an appropriate margin of error. The Court has held that such testimony depends upon the credibility of the expert in each case, rather than an issue of law.

702[D.8.a.ii] Speed Detection (Radar)

Most states, including Nebraska, have statutes providing for the prima facie admissibility of speed measurement devices such as various forms of radar. Nebraska Revised Statutes Section 60-6,192 provides that "radio microwave, mechanical, or electronic speed measurement device may be accepted as competent evidence of the speed of such motor vehicle in any court or legal proceeding when the speed of the vehicle is at issue." However, before the state can offer the results of such speed measurement devices, the state has the burden to prove (a) the instrument was in proper working order at the time of the measurement; (b) the device was operated "in such a man-

409. Baue, 258 Neb. at 977-78, 607 N.W.2d at 200.
410. Id. at 986-87, 607 N.W.2d at 205.
411. Id. at 979, 607 N.W.2d at 200 (finding that pretrial hearing testimony of an expert on margin of error of intoxilyzer results not rebutted during the pretrial hearing was not binding on trial court where conflicting evidence on margin of error presented during the trial) (overruling State v. Burling, 224 Neb. 725, 400 N.W.2d 872 (1987) to the extent inconsistent with the court's holding in Baue).
ADMISSIBILITY OF EXPERT TESTIMONY

This statute permits such results to be admitted into evidence even without any foundational evidence regarding the reliability of the underlying theory or the accuracy of the methodology incorporated into the alternative speed devices. The state merely has to lay foundation at the application level as specified in the subparagraphs above, namely the qualifications of the operator and evidence that the instrument was in proper working order when used in the instant case.

702[D.8.b] Theory and Methodology Established by Case Law

Courts may also look to prior case law where the theory and methodology have been previously established as reliable under a Daubert review. Where the theory and methodology have been previously established or rejected by case law in Nebraska under Frye, then Schafersman demands that the courts re-examine the prior findings in light of the additional Daubert foundational steps. In comparison, where the theory and methodology has been previously established in either federal court or other state courts under Daubert principles, the Nebraska courts may look to the persuasiveness of these analyses in exercising their Rule 104(1) discretion in determining preliminary issues of fact. Of course, in making this preliminary finding, the number of other cases either accepting or rejecting the reliability of the theory or methodology at issue, the judicial level of the opinions, the personal prestige of the individual judge, the quality of the analyses and even the jurisdiction of the respective opinions, would all be relevant in determining the reliability issues.


As an example of a prior Nebraska determination of a expert evidence issue that may need to be re-examined in light of Schafersman, the Nebraska Supreme Court under the Frye standard judicially noticed the horizontal nystagmus (HGN) test as a generally accepted test for determining a probable cause basis that the person being examined was under the influence of alcohol.414 While this prior accept-

413. NEB. REV. STAT. § 60-6,612.
414. Baue, 258 Neb. at 985, 607 N.W.2d at 204 (finding the HGN test admissible for the limited purpose of establishing an impairment that may be caused by alcohol) (reversing State v. Borchardt, 224 Neb. 47, 58-59, 395 N.W.2d 551, 559 (1986) (finding the horizontal nystagmus test insufficiently reliable to be admissible for any purpose)).
ance of the test would be relevant in a Daubert hearing, especially because the issue of general acceptability is one of the four Daubert factors, a defendant challenging this finding of reliability should demand more foundation regarding prior (1) testing of the theory and methodology, (2) evidence of peer reviewed discussion of the issues, and (3) an established and known rate of error in the administration of the specific methodology employed by the police officer. Simply stated, Schafersman’s adoption of Daubert would require more foundation of the reliability of the test than the Court demanded in the prior Frye analysis.

702[D.8.b.ii] Case Law Excluding Categories of Expert Testimony as Per Se Unreliable

The Nebraska courts have consistently excluded such testimony as polygraph testimony415 and testimony that has been enhanced by hypnosis.416 These per se rules of inadmissibility may have to be re-evaluated under the newly adopted Daubert principles. The per se exclusionary rules may be the same even under a complete Daubert review, but without such a review the issue should be perceived as open under Schafersman.

702[D.8.c] Theory and Methodology Established by Judicial Notice

Rule 201 of both the Federal and the Nebraska Rules of Evidence provide judicial notice as an alternative basis for the court’s determining the Rule 104(1) preliminary issue of reliability of the expert’s theory and methodology. However, few scientific theories or methodologies (instruments) are a matter of common knowledge (Rule 201(1)) and few can be said to be “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”417 In the area of expert testimony, learned treatises may

416. State v. Palmer (“Palmer I”), 210 Neb. 206, 218, 313 N.W.2d 648, 655 (1981) (“[U]ntil hypnosis gains acceptance to the point where experts in the field widely share the view that memories are accurately improved without undue danger of distortion, delusion, or fantasy, a witness who has been previously questioned under hypnosis may not testify in a criminal proceeding concerning the subject matter adduced at the pretrial hypnotic interview.”); State v. Patterson, 213 Neb. 686, 690, 331 N.W.2d 500, 503 (1983) (determining that while “direct evidence obtained solely by reason of hypnosis is inadmissible per se,” the witness will be permitted to testify with regard to those matters which he or she was able to recall and relate prior to hypnosis provided that there is sufficient evidence to satisfy the court that the evidence was known and related prior to hypnosis); See also Rock v. Arkansas, 483 U.S. 44, 56 (1987) (establishing a per se exclusionary rule that “operates to the detriment of any defendant who undergoes hypnosis,” without regard to verification of prehypnotic memory would violate the Fifth Amendment’s Due Process Clause).
417. FED. R. EVID. 201(2); NEB. REV. STAT. § 27-201(2) (1995).
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资格作为能够满足《联邦证据规则》201(2)的规定和《联邦证据规则》201(4)的规定，要求提出证明的人提供法院“必要的信息”以进行司法注意的决定。

问题是如何让律师适当地向法庭提出可能帮助确定《道尔伯特》的权威文献。

权威文献可能作为排除 hearsay exception 的情况，根据《内布拉斯加州证据规则》803(17) 和《联邦证据规则》803(18)，但这种 hearsay 例外需要专家提供权威文献可靠性的基础。有一种办法让法院就一个理论或方法论进行司法注意无需专家作证吗？在作出《联邦证据规则》104(1) 初步事实问题的决定时，法院可以依据《联邦证据规则》104(a) 和《内布拉斯加州证据规则》104(1) 依靠不可归入的证据。虽然权威文献的可靠性通常在本辖区不可能成为常识（《联邦证据规则》201(1)），但可以由专家或专业图书管理员立个声明以建立这种基础。这种声明应陈述专家、图书管理员、权威文献和作者的资历。虽然这种声明可能是 hearsay，通常法院可以根据不可归入的证据在作出《联邦证据规则》104(1) 初级事实问题的决定时。当然，《联邦证据规则》201(5) 规定对方律师必须提前通知对方律师的意图进行司法注意和十面之才的事项。

418. FED. R. EVID. 201(4); NEB. REV. STAT. § 27-201(4) (1995).
419. FED. R. EVID. 201(5); NEB. REV. STAT. § 27-201(5) (1995).
Schafersman should not be ignored. The following provides some illustrative examples of recurring expert evidence issues that have been previously decided in Nebraska, but will need to be re-evaluated as a consequence of Schafersman.

702[D.8.d.ii] DNA

Perhaps the best subject matter to work from in developing a useful paradigm for admissibility of scientific evidence is DNA. The Nebraska Supreme Court first established a foundational checklist for the admissibility of DNA evidence in State v. Houser. Houser's foundational checklist provides a useful guide for all categories of scientific evidence and can easily be modified to incorporate the Daubert standards.

First, the Court in Houser established that a court should consider the admissibility of novel expert testimony outside the presence of the jury. This ruling established that in Nebraska state courts the judges have screening responsibilities for novel scientific evidence. Schafersman reinforces this responsibility, but extends the reach of the court's screening role beyond the occasional case involving novel scientific evidence to include all expert testimony. Schafersman, therefore, increases dramatically the instances where a pretrial hearing on the admissibility of expert testimony will be necessary.

Second, the Court in Houser established that the experts must be qualified as experts within the scientific field under consideration. Again, the qualification requirement continues under Schafersman, but extends beyond scientific fields of expertise to include all experts.

Third, the Court in Houser established that the experts should offer evidence, and the trial court should make a preliminary finding that the scientific theory is generally accepted within the scientific community. The evidence in Houser that DNA "finger-printing" identification "has existed for a long period of time and is an accepted scientific principle[,]" will continue to be important, but not sufficient.

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420. 241 Neb. 525, 544, 490 N.W.2d 168, 181 (1992). Houser established that when faced with a novel scientific evidence issue such as DNA evidence, the trial court should preliminarily decide, outside the presence of the jury, the following: (1) whether the witnesses on the DNA issue are experts in the relevant scientific fields, (2) whether DNA profile testing used in the case under consideration is generally accepted by the relevant scientific communities, (3) whether the method of testing used in the case under consideration is generally accepted as reliable if performed properly, (4) whether the test conducted properly followed the method, (5) whether [restriction fragment length polymorphism ("RFLP") analysis evidence is more probative than prejudicial under § 27-403, and (6) whether statistical probability evidence interpreting RFLP analysis results is more probative than prejudicial. Houser, 241 Neb. at 544, 490 N.W.2d at 181.

421. Houser, 241 Neb. at 541, 490 N.W.2d at 179.
in establishing foundation for the theory of DNA matching. Of course, in the instance of DNA the theory is generally accepted (the fourth *Daubert* factor), in part, because the other *Daubert* factors are well accepted in the field of DNA analysis: (1) the testable theory has been tested, (2) has been the subject of countless peer-reviewed publications, and (3) has both an established rate of error and well established methodological protocols. These additional *Daubert* inquiries provide the obvious changes that *Schafersman* will require in the future.

Fourth, the Court in *Houser* established that the court should also make a factual finding outside the presence of the jury regarding whether the methodology of testing the DNA used in the forensic analysis is generally accepted as reliable for forensic purposes within the scientific community.422 The above-discussion for the acceptability of the theory of DNA matching applies equally to established methodologies.

Fifth, the trial court must determine whether the specific procedures were properly followed. As applied to the specific DNA testing at issue, were the protocols set up by the specific forensic laboratory (1) accepted as valid and (2) have they been followed in the particular case? This “applied” level of the foundation for expert testimony is always an issue. Although the Court in *Schafersman* suggests this issue is not a gate keeping issue for the court under *Daubert*, that conclusion is questionable given the post-*Daubert* federal authority to the contrary discussed above.

Sixth, the Court in *Houser* established that the court in the preliminary hearing should consider the reliability of the probability calculations. This separate issue under *Houser*423 has simply become part of the foundation for the reliability of the theory and methodology under *Daubert* and *Schafersman*.

Finally, the Court in *Houser* established that the court should consider whether the probative value of the expert’s probability testimony is outweighed by its prejudicial effect. Again, the completeness of the foundational requirements under *Daubert* makes this added step somewhat superfluous. Rule 403 concerns are really subsumed in the more complete *Daubert* analysis.

422. *See* State v. Jackson, 255 Neb. 68, 79-80, 582 N.W.2d 317, 325 (1998) (upholding the admissibility of the PCR STR methodology as an alternative PCR methodology that is equally acceptable as other well-accepted DNA methodologies).

423. Although the court questioned the reliability of the probability analysis of DNA evidence in *Houser*, especially as applied to the black population to which the victim’s blood which was being analyzed, the court in State v. Freeman, 253 Neb. 385, 571 N.W.2d 276 (1997) held the probability analysis sufficiently well established to uphold the probability testimony.
Expert testimony on causation often provides the critical proof in many criminal, personal injury or toxic tort cases. For example, the critical issue in *Schafersman* was whether the plaintiff's expert could establish a causal connection between the consumption by plaintiff's dairy cows of contaminated oats the defendant had delivered and the illnesses that the cows suffered shortly thereafter. Intuitively, the jury could see the relevance of a temporal connection between the time of the consumption and the subsequent illnesses. However, Plaintiff's expert, Dr. Wass, offered an opinion that went beyond temporal proximity. He offered the opinion that while "no minerals were present in the feed that were, singly, above scientifically accepted toxic or even tolerable levels," the cows had been afflicted as a consequence of "multiple mineral toxicity" when they ate the contaminated oats.

The Nebraska Supreme Court found two different foundational problems with Wass's expert testimony. First, his scientific theory that "multiple mineral toxicity" "could result when a number of potentially toxic materials were simultaneously fed to cows in otherwise-tolerable quantities," had never been tested and evaluated either by Dr. Wass or anyone else. Simply stated, he had not even come close to satisfying any of the *Daubert* (or *Frye*) standards of admissibility. Second, he had not conducted "a differential diagnosis to rule out other possible causes of any illness." In critiquing Wass's methodology as incomplete at best, the Court inferentially highlights the importance of conducting a differential diagnosis regardless of the apparent reliability of any alternative test for causation. If the expert does not rule out other explanations for the injury or illness, then the expert has not completed a rational investigation.

Experts often are called upon to give testimony on the valuation of property. Because the reliability of such valuation often depends

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424. *See, e.g.*, State v. Schenck, 222 Neb. 523, 384 N.W.2d 642 (1986) (upholding expert testimony that bruises found on a rape victim's arms during a medical examination conducted two weeks after the rape could have been caused at the time of the rape); State v. Max, 1 Neb. App. 257, 492 N.W.2d 887, 891 (1992) (upholding, in a child sexual abuse case, the expert testimony of a treating physician that "it was probable that the circular pattern of warts on the victim's anus was caused by the shaft of [the defendant's] penis . . .").
425. *Schafersman*, 262 Neb. at 218, 631 N.W.2d at 868.
426. *Id.* at 221, 631 N.W.2d at 869.
427. *Id.*
428. *Id.* at 223, 631 N.W.2d at 871.
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more upon the subjective experience and training of the expert than the scientific precision of a DNA lab, foundational problems abound. Prior to Schafersman, counsel could feel somewhat comfortable in side stepping even a Frye foundation because the theories and methodologies of property valuation are hardly novel. Courts were inclined to admit such testimony freely, leaving issues of credibility to the strictures of cross-examination, opposing expert opinions, and closing argument. However, Schafersman adopted not only Daubert but Kumho as well. Courts cannot simply defer to the jury for evaluating experience-based expert testimony, but must perform their gate keeping responsibility. Although the specifics of the Daubert standards may not make sense in many of the experience-based expert testimony cases, the proponent should seek to establish equivalent standards of reliability appropriate to the subject matter under consideration.

First, the witness must be qualified as competent to give an opinion regarding land valuation. The owner of the land familiar with the value and uses of his own land will generally be held qualified to give an expert opinion regarding the value of his or her own land. This particular expertise may even extend to nonowners who are familiar with the particular land’s characteristics and uses. Otherwise, a witness must be qualified by experience and training in giving the specific type of land valuation relevant in the instant cases. For example, if a witness is unfamiliar with the specific property rights entailed in the valuation at issue, or is only qualified to give property valuation for purposes unrelated to those purposes being litigated, then he or she should not be permitted to give testimony in the case at bar.

Once a witness has been qualified by peculiar familiarity with the specific land at issue or by experience or training as an appraiser familiar with the purposes being valued, then the proponent of the evi-


431. See, e.g., Sorensen v. Lower Niobrara Natural Res. Dist., 221 Neb. 180, 199-200, 376 N.W.2d 539, 552 (1985) (reversing and remanding because the appraiser had misinterpreted the law regarding rights acquired in eminent domain proceedings; noting “[a]n expert’s opinion based on a misinterpretation or misconception of applicable law renders the opinion irrelevant”).

evidence should establish the reliability of the methodology relied upon by the expert in forming his opinion. The three commonly accepted approaches for valuing real property include

1. The market data approach, or comparable sales method, which establishes value on the basis of recent comparable sales of similar properties;
2. The income, or capitalization of income, approach, which establishes value on the basis of what the property is producing or is capable of producing in income;
3. The replacement or reproduction cost method, which establishes value upon what it would cost to acquire the land and erect equivalent structures, reduced by depreciation.

Valuation based upon comparable sales remains the most commonly accepted method for property valuation. However, the proponent of the evidence must establish evidence that the parcels are indeed sufficiently similar to be comparable. In considering the reliability of expert testimony based upon the comparable sales method, the Court has previously established that

- evidence as to the sale of comparable property is admissible as evidence of market value, provided there is adequate foundation to show the evidence is material and relevant. The foundation evidence should show the time of the sale, the similarity or dissimilarity of market conditions, the circumstances surrounding the sale, and other relevant factors affecting the market conditions at the time.

If rental profits are reasonably expected, the income method is an acceptable alternative method. The replacement cost method is rarely appropriate and applies most commonly when the property is unique and comparable sales are not available.

While the trial court should exclude expert testimony concerning property valuation where there is insufficient foundation to "enable him or her to express a reasonably accurate conclusion as distin-
guished from a mere guess or conjecture,"438 a trial court's ruling is subject to an abuse of discretion standard on appeal.439

702[D.8.d.iv.b] Medical Testimony on Whether Medical Expenses Necessitated by the Injury

In many personal injury cases, an issue is presented as to who is qualified to give testimony regarding whether the medical expenses incurred from various health providers were (1) reasonably necessitated as a consequence of the injury at issue and (2) reasonable and fair. Must the proponent call each health provider who provided the service or may counsel call one treating physician if that physician can form an opinion to a reasonable degree of medical certainty as to the reasonable necessity of each medical expense? Because Rule 703 permits an expert to rely upon inadmissible evidence in forming an opinion, if such experts reasonably rely upon such evidence in forming an opinion, a single properly qualified expert should be allowed to give such testimony. The qualified witness should be prepared to testify that, upon reviewing the medical bills and records from multiple providers, he or she has formed an opinion to a reasonable degree of medical certainty that the medical bills were reasonably necessitated by the injury.440

702[D.8.d.iv.c] Damages for Permanent Impairment of Future Earnings

Expert testimony concerning the scope of damages for permanent injuries requires detailed foundation that may require more than one expert. First, a qualified physician may have to establish the extent and permanency of the personal injury.441 Second, an expert qualified in vocational rehabilitation may have to translate the effect of any personal injury on the person's ability to perform the type of work that person has been trained to perform or any other alternative work.442

438. Franksen, 257 Neb. at 616, 599 N.W.2d at 617 (1999) (citing Langfeld v. Dep't of Roads, 213 Neb. 15, 328 N.W.2d 452 (1982)).
439. Id. at 615, 599 N.W.2d at 616 (citations omitted).
440. Gittins v. Scholl, 258 Neb. 18, 21-23, 601 N.W.2d 765, 767-69 (1999) (reversing and remanding because the trial court excluded opinion testimony from the treating physician that based upon his review of Gittins' medical bills that "he had an opinion, to a reasonable degree of medical certainty, [that] the bills were necessitated by the collision with [defendant's] vehicle").
441. Phillips v. Indus. Mach., 257 Neb. 256, 262, 597 N.W.2d 377, 382 (1999) (excluding permanent injury testimony from a vocational rehabilitation person, to establish the extent of the personal injury as well as the effect on the work performance because the testimony was generic and uncertain).
Finally, an economist may have to make an economic determination of the dollar amount required, reduced to present worth, to compensate the injured party for the extent and duration of the impairment.\textsuperscript{443} Restated differently, expert testimony regarding damages for impairment of future earnings requires adequate factual basis and will be excluded if the projection appears speculative with regard to (1) the extent of the injury, (2) the effect on work performance or (3) the present worth of the damages.\textsuperscript{444}


The Nebraska Supreme Court, in \textit{Anderson v. Nebraska Department of Social Services},\textsuperscript{445} rejected the admissibility of expert testimony on hedonic, or value-of-life, damages. \textit{Anderson} involved a tort claims action brought against the Nebraska Department of Social Services for negligence in placing, in a foster home a boy who sexually assaulted and injured the minor daughters of the foster parent. On the issue of damages, the parent proffered an economist, Stan Smith, who established a formula for calculating the value of lost enjoyment of life. Smith calculated what he considered to be the average value of life on a “willingness to pay” approach relying on statistical analysis of “an individual’s willingness to pay for safety (e.g. airbags), the willingness to accept payment to endure risk of death in a job (e.g., coal miner), and the costs of government regulations.”\textsuperscript{446} Based on these analyses, Smith calculated the average value per statistical life saved to be $2.3 million (in 1988 dollars). After an extensive review of the literature and conflicting authority, the Nebraska Supreme Court held that the testimony “does not satisfy the standards for admissibility of expert testimony under the Nebraska Evidence Rules.”\textsuperscript{447} The Court in \textit{Anderson} rejected the expert testimony on the value of life as “non-scientific” under Nebraska’s \textit{Frye} standard, outlined in \textit{State v.} vocational rehabilitation expert based upon worklife tables inadmissible because of lack of foundation regarding whether the extent of the personal injury suffered by the injured party could be related to the tables relied upon by the vocational rehabilitation expert).

\textsuperscript{443} See \textit{Snyder}, 259 Neb. at 630, 611 N.W.2d at 417 (stating future earnings must be illustrated through competent evidence); \textit{Uryasz v. Archbishop Bergan Mercy Hosp.}, 230 Neb. 323, 330-31, 431 N.W.2d 617, 622-23 (1988) (noting that the determination of damages is not obvious to the lay person and thus should be established by an expert with a financial background).

\textsuperscript{444} Nebraska Nutrients, Inc. v. Shepherd, 261 Neb. 723, 766, 626 N.W.2d 472, 507-08 (2001) (finding expert projections regarding damages for future business losses admissible based upon expert testimony that a plant utilizing novel technology would have operated successfully as designed).

\textsuperscript{445} 248 Neb. 651, 538 N.W.2d 732 (1995).

\textsuperscript{446} \textit{Anderson v. Nebraska Dept of Social Servs.}, 248 Neb. 651, 664, 538 N.W.2d 732, 741 (1995).

\textsuperscript{447} \textit{Anderson}, 248 Neb. at 669, 538 N.W.2d at 743.
Reynolds. Because there is no basic agreement, even among economists as to what elements ought to be evaluated in assessing the value of life, expert testimony on such matters would be suspect and would not meaningfully assist the trier of fact.

On remand, the district court increased the damage award by a $100,000, from $348,341.83 to $448,341.83 labeling the damages an award for pain and suffering rather than hedonic damages. The court on the second appeal affirmed, reasoning that the amount of damages for pain and suffering is a matter for the trier of fact unless the award "is so excessive as to shock the conscience."450

702[D.8.e] Improper Subject for Expert Testimony

702[D.8.e.i] Improper Subject: Law

Expert testimony is irrelevant and inadmissible on the meaning and interpretation of law, because the meaning of law is for the court, not the trier of fact. The scholarship of legal experts "should not reach a judge's attention by way of the witness stand," but rather "in an appropriate brief." If the testimony goes "to the custom and practice of an industry," rather than the meaning of law, then expert testimony may be appropriate even if the testimony is intended "to elucidate the meaning of ambiguous language" in a contract. However, in cases such as obscenity cases where the law is dependent upon a finding of a breach of community standards, expert testimony is inadmissible on the issue of community standards.

448. Id. (citing State v. Reynolds, 235 Neb. 662, 681-82, 457 N.W.2d 405, 418 (1990)).
450. Anderson/Couvillon, 253 Neb. at 821, 572 N.W.2d at 368.
452. Sasich, 216 Neb. at 874, 347 N.W.2d at 99.
454. State v. Harrold, 256 Neb. 829, 857, 593 N.W.2d 299, 319 (1999) (finding that Cable Vision's coordinator for broadcasting could not testify regarding community standards for purposes of determining whether a broadcast was obscene), cert. denied, 528 U.S. 1142 (2000); Main St. Movies v. Wellman, 251 Neb. 367, 371, 557 N.W.2d 641, 645
Improper Opinion: the Testimony Will Not Assist the Trier of Fact Because It Is the Issue to Be Decided (a Variation of the Ultimate Issue Rule 704)

While Rule 704 largely abolishes the common law ultimate issue rule, the essence of the rule may provide a basis for excluding expert testimony that seeks to answer the exact question posed to the jury. The Court has explained that an expert's opinion arguably will not assist the trier of fact if it is "nothing more than an expression of how the trier of fact should decide a case or what result should be reached on any issue to be resolved by the trier of fact." If the subject matter of the expert witness is clearly within the comprehension of lay persons, then counsel should object on relevancy grounds to such testimony. The Nebraska Supreme Court in Reynolds noted that the "relevancy" basis for excluding ultimate-issue-type testimony was not affected by the United States Supreme Court's decision in Washington v. Texas. The Court in Reynolds held that the Sixth Amendment to the United States Constitution prohibits a state from applying an evidentiary rule that "prevents a defendant from presenting a defense based upon relevant evidence." The court explained, "the [S]ixth [A]mendment does not make irrelevant evidence admissible and does not render admissible an expert's opinion which does not assist the trier of fact under Neb. Evid. R. 702.

However, courts will admit expert testimony on subject matter commonly within lay comprehension if the expert testimony will "add precision or depth to the jury's ability to reach conclusions about the subject' before the jury." Applying these competing standards, the

(1997) (stating that a county attorney's "knowledge, skill, experience, training, and education as a prosecutor do not qualify him as an expert in determining public opinion").

455. Reynolds, 235 Neb. at 668-69, 687-88, 457 N.W.2d at 411, 421 (upholding the trial court's admission of the testimony of two psychiatrists that the defendant's personality disorders caused him to have poor impulse control, but excluding as "nothing more than 'a factual determination which can be made by any juror who hears the evidence,'" the testimony of the same experts that the actual shooting of the investigating officer on the night in question "was in fact an impulsive or spontaneous act"). Accord, State v. Max, 1 Neb. App. 257, 492 N.W.2d 887, 892 (1992); Rawlings v. Andersen, 195 Neb. 686, 693, 240 N.W.2d 568, 573 (1976). But see, Childers v. Phelps County, 252 Neb. 945, 952-53, 566 N.W.2d 463, 468-69 (1997) (upholding the admission of "proximate cause" opinion given by a civil engineer that the county's failure to properly maintain adequate signage, rather than driver error, was the proximate cause of the accident). See also Doe v. Gunny's Ltd. P'ship, 256 Neb. 653, 665-66, 593 N.W.2d 284, 292-93 (1999) (upholding expert testimony suggesting that if the defendant business landlord had hired a security guard to patrol the area the sexual assault that occurred would have been prevented).

457. Reynolds, 235 Neb. at 690, 457 N.W.2d at 422.
458. Id. at 690, 457 N.W.2d at 422-23.
459. Id. at 684, 457 N.W.2d at 419 (quoting State v. Helterbridle, 301 N.W.2d 545, 547(Minn. 1980)).
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Nebraska courts have occasionally excluded expert testimony on uncomplicated subjects that embrace matters of common knowledge, but also have upheld the admission of expert testimony on subject matter thought to be within the knowledge of lay persons.

702[D.8.e.iii.a] Eye-Witness Identification Testimony

The courts have generally disfavored expert testimony regarding the unreliability of eye-witness testimony on the grounds that the opinion is both a matter of common experience and an issue of witness credibility, a matter peculiarly within the province of the jury.

702[D.8.e.iii.b] Credibility Testimony

Expert testimony is generally inadmissible on the respective credibility of witnesses, parties and victims, because the issue of credibility is for the jury. While expert testimony concerning the credibility of particular individuals may be inadmissible as within the purview of the trier of fact, expert testimony may be admissible to establish syndromes or conditions that may affect the credibility of persons suffering from such a condition or syndrome.

460. See Dotzler v. Tuttle, 234 Neb. 176, 183-84, 449 N.W.2d 774, 779-80 (1990) (upholding the exclusion of the “expert” opinion of a person who had played 15,000 to 20,000 games of pickup basketball, regarding whether the defendant had been running recklessly on a fast break during a basketball game when he had run over the plaintiff); Johannes v. McNeil Real Estate Fund VIII, 225 Neb. 283, 286, 404 N.W.2d 424, 427 (1987) (upholding, in a “slip and fall” case, the exclusion of testimony of plaintiff’s expert architect that sidewalks are safer to walk on than grass); State v. Ammons, 208 Neb. 812, 814, 305 N.W.2d 812, 814 (1981) (excluding the testimony of a psychologist who was qualified as an expert on the reliability of eye-witness identification on the ground that “expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens”).

461. See Coppi v. West Am. Ins. Co., 247 Neb. 1, 14-16, 524 N.W.2d 804, 814-16 (1994) (upholding the admission of testimony of an expert insurance adjuster on the adequacy of the insured’s record-keeping practices even though record-keeping practices generally are within the competence of lay persons); Brown v. Farmers Mut. Ins. Co., 237 Neb. 855, 867, 468 N.W.2d 105, 114 (1991) (upholding the admission of expert testimony of State Patrol Officers regarding whether a livestock thief or thieves were operating in Dawes County).

462. State v. Trevino, 230 Neb. 494, 517, 432 N.W.2d 503, 520 (1988) (rejecting expert testimony regarding the unreliability of eyewitness identification testimony and stating “it is not for an expert to suggest to the jury how a witness’ testimony shall be weighed or evaluated”); Ammons, 208 Neb. at 814, 305 N.W.2d at 814-15 (1981) (upholding the exclusion of the defendant’s expert psychologist, who offered to testify that eyewitness identification testimony tends to be inaccurate and unreliable, reasoning that “expert testimony is admissible only if it will be of assistance to the jury in its deliberations and relates to an area not within the competency of ordinary citizens”).

463. See State v. Smith, 241 Neb. 311, 319, 488 N.W.2d 33, 38 (1992) (holding inadmissible a police officer’s testimony that based upon her experience interviewing such victims she believed the story told by the thirteen-year-old victim of a sexual assault, reasoning: “It is totally improper for one witness to testify as to the credibility of another witness. The question of any witness’ credibility is for the jury”); State v. Doan, 1
Expert testimony is generally inadmissible on whether a criminal defendant did nor did not have the requisite intent of the crime charged.\textsuperscript{464}

While testimony within the comprehension of lay persons will often be excluded as unlikely to assist the trier of fact, expert testimony may be admissible if it would be helpful in reinforcing, sharpening, enhancing, or contradicting the probative value of intuitive inferences.\textsuperscript{465}

\textsuperscript{464} State v. Kistenmacher, 231 Neb. 318, 320, 436 N.W.2d 168, 170 (1989) (per curiam) (upholding the inadmissibility of defense's psychiatric testimony that the defendant had been "desensitized to the serious nature of the games he was playing" by "his choice of violent television programs, heavy metal music, and horror-type movies"); State v. Lowe, 244 Neb. 173, 186, 505 N.W.2d 662, 671 (1993) (upholding the exclusion of defendant's expert testimony that the defendant's level of intoxication would have effected his ability to form the necessary intent to commit the crime of second degree murder, reasoning "[t]he defendant did not claim to have any mental illness or defect which would cause a response that would have been beyond the understanding of the jury"). This result is consistent with Federal Rule of Evidence 704(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 of a defense thereto. Such ultimate issues are matters for the trier of fact alone." Fed. R. Evid. 704(b).

\textsuperscript{465} Anderson/Couvillon, 253 Neb. at 817, 572 N.W.2d at 366 (upholding expert testimony that a child sexual assault victim was suffering from post traumatic stress syndrome); Talle v. Nebraska Dept. of Soc. Servs., 249 Neb. 20, 541 N.W.2d 30 (1995) ("Talle I"); State v. Roenfeldt, 241 Neb. 30, 486 N.W.2d 197 (1992) (upholding the admissibility of a physician's testimony, in a child sex-abuse case, regarding the symptoms, behavior and feelings generally exhibited by children who have been sexually abused because "[f]ew jurors have sufficient familiarity with child sexual abuse to understand the dynamics of a sexually abusive relationship," and "the behavior exhibited by sexually abused children is often contrary to what most adults would expect") (citation omitted); State v. Schenck, 222 Neb. 523, 531, 384 N.W.2d 642, 648 (1986) (upholding the admissibility of expert medical testimony regarding the significance of bruises found on a rape victim's arms during a medical examination conducted two weeks after the rape, reasoning "the jury needed specialized knowledge to determine whether those bruises could have been sustained 2 weeks earlier"); State v. Max, 1 Neb. App. 257, 492 N.W.2d 887, 891-92 (1992) (upholding the admission of the testimony of a treating physician that "it was probable that the circular pattern of warts on the victim's anus was caused by the shaft of the defendant's penis," which was infected with the same type of warts). But see, Doan, 1 Neb. App. 484, 490, 498 N.W.2d at 809 (1993) (quoting State v. J.Q., 252 N.J. Super. 11, 28, 599 A.2d 172, 181 (1991), aff'd, 130 N.J. 554, 614 A.2d 1196 (1993) (quoting State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983))) (noting, in a child abuse case, that although a qualified expert may explain the Child Sexual Abuse Accommodation Syndrome (CSAAS) "to dispel the idea that secrecy, belated disclosure
ADMISIBILITY OF EXPERT TESTIMONY

702[D.8.f] Re-enactments

A properly qualified expert,\(^{466}\) may testify regarding relevant re-enactment experiments if proper foundation is laid as to the similarity of conditions between the experiment and the facts of the case.\(^{467}\) In conducting an illustrative experiment, while exact similarity of conditions is not required,\(^{468}\) dissimilarity will always affect the weight of the evidence and may provide a basis for exclusion if the experiment is more likely to confuse than enlighten the trier of fact.\(^ {469}\)

702[E] FEDERAL VARIATIONS

Because the Nebraska Supreme Court adopted the federal \textit{Daubert} standard for expert testimony under Rule 702, there should be no variation between state and federal law. The Court’s dicta in \textit{Schafersman}, that \textit{Daubert} applies to theory and methodology, but not conclusions, may have the effect of creating a slight difference between the way the two rules are administered. However, it is much more likely that the Nebraska Supreme Court will come to the same conclusion that the federal courts have on this same issue: unreliable conclusions, even if premised upon reliable theories and methodologies, should no more be a jury issue than any other indicia of unreliability.

CONCLUSION

Without changing a word of Nebraska Rules of Evidence 702, the Nebraska Supreme Court’s adoption of \textit{Daubert} in \textit{Schafersman} should effect a significant change in the manner in which expert evi-
Evidence is handled in Nebraska courts. Whenever the testimony of an expert is a critical part of the case, counsel should review the Daubert checklist for possible foundational challenges. If the expert’s underlying theory, dependent methodology or conclusions appear questionable, then counsel should file a motion in limine seeking a pretrial determination of the reliability of the expert’s opinion. In comparison to the relatively rare Frye hearing, previously reserved for novel scientific theories and methodologies, this Daubert hearing should become a much more common practice in future Nebraska cases. If the Daubert challenge is rejected at the pretrial hearing, or if counsel first becomes aware of a Daubert problem during the course of the trial, then opposing counsel should raise a Rule 702 objection at trial. If the Rule 702 objection is overruled, then counsel should renew the objection at the close of the evidence and move to strike the expert testimony that counsel deems unreliable. If this is unsuccessful and the trier of fact returns an unfavorable verdict, then counsel should renew the Daubert motion to exclude. If unsuccessful again, then counsel should raise the issue on appeal. Conversely, if facing a Daubert challenge, the proponent must be careful to address the Daubert foundation or risk losing the testimony of the expert. Most importantly, counsel should remain aware that even if the Daubert challenge loses at the trial court level, an appellate court may reverse and may also decide not to remand. Quite simply, counsel should carefully consider any Daubert challenge as a potentially outcome-determinative challenge. As a consequence, the Nebraska Supreme Court’s decision in Schafersman will likely prove one of the most significant decisions the Court has ever made concerning the Nebraska Rules of Evidence.