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CHRISTIAN V. GRAY: THE OKLAHOMA SUPREME COURT ACCEPTS THE *DAUBERT* STANDARD

DEBRA W. MCCORMICK* & RANDON J. GRAU**

I. Introduction

Over a decade has passed since the U.S. Supreme Court issued its opinion in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹ regarding the standard for admitting expert testimony. Although *Daubert* changed the everyday practices of attorneys in federal courts across the nation, *Daubert* may not seem like a “recent development” deserving attention as one of the latest legal trends.² In *Christian v. Gray*,³ however, the Oklahoma Supreme Court recently adopted the standard set forth in *Daubert* and *Kumho Tire Co. v. Carmichael*,⁴ thus reviving the interest in examining *Daubert*, its progeny, and its unique application regarding the standard of review within the context of the Oklahoma civil court system.

This Article discusses the Oklahoma Supreme Court’s adoption of the *Daubert* standard in Oklahoma. Part II introduces the *Daubert* standard and explores the U.S. Supreme Court cases following and applying *Daubert*. Part III traces the history and development of the *Daubert* standard in Oklahoma. Next, Part IV examines *Christian v. Gray*, in which the Oklahoma Supreme Court adopted *Daubert* for civil cases in Oklahoma. Finally, Part V illustrates how Oklahoma courts may apply *Daubert* in future civil cases.

II. The *Daubert* Standard

In *Daubert*, the U.S. Supreme Court rejected the “generally accepted” rule for admissibility of scientific evidence established in *Frye v. United States*,⁵ and instead held that the Federal Rules of Evidence (FRE), adopted some fifty

1. Founding partner, Mitzner, Rubenstein, Bryan, McCormick & Pitts, P.L.L.C., Oklahoma City, Oklahoma. B.S., William Woods College (Missouri), 1977; J.D., Oklahoma City University, 1989. Managing Editor, *Oklahoma City University Law Review*, 1988-1989.

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The authors thank OU law student Rick Warren for his assistance with this article.

1. 509 U.S. 579 (1993).

2. Robert J. Shaughnessy, *Daubert After a Decade*, 30 LITIG. 19, 19 (2003).

3. 2003 OK 10, 65 P.3d 591.

4. 526 U.S. 137 (1999).

5. 293 F. 1013 (D.C. Cir. 1923).

years after *Frye*, controlled admissibility of expert testimony.⁶ In doing so, the Court held that FRE 702 did not incorporate the *Frye* standard, which required a court to determine the general acceptance of the proposed expert's method in the relevant scientific community.⁷ Instead, the Court found that the rigid *Frye* test was at odds with the "liberal thrust" of the Federal Rules.⁸

In rejecting the *Frye* standard, the Court noted that the role of the trial judge is to screen all expert evidence, thus acting as a "gatekeeper" responsible for determining whether such evidence is admissible.⁹ The Court found that the trial judge, as gatekeeper, is responsible for determining both the relevance and reliability of expert testimony.¹⁰

In examining the relevance of proffered expert testimony, the trial judge must conclude whether the proposed testimony will "assist the trier of fact," as stated by FRE 702, meaning that the evidence must "fit" the issues in the case.¹¹ If the evidence is relevant, then the trial court must determine whether the expert testimony is reliable. The *Daubert* Court held that a judge may consider the following factors when determining whether expert testimony is reliable: (1) whether the theory or technique can be or has been tested; (2) whether the theory or technique has been subjected to peer review and publication; (3) whether there is a known or potential rate of error and whether there are standards controlling the technique's operation; and (4) whether the relevant scientific community generally accepts the technique or theory.¹²

The U.S. Supreme Court further defined and expanded the *Daubert* standard in *Kumho Tire Co. v. Carmichael*. Although *Daubert* limited the reliability analysis to "scientific knowledge," the *Kumho Tire* Court extended the *Daubert* analysis and held that the underlying reliability requirement in *Daubert* applied to all expert witnesses, including those who rely on technical or other specialized knowledge.¹³

In both *Daubert* and *Kumho Tire*, the Court emphasized the flexibility of the factors a court should consider in determining whether expert testimony

6. *Daubert*, 509 U.S. at 588-89.

7. *Id.*

8. *Id.* at 588.

9. *Id.* at 589.

10. *Id.*

11. *Id.* at 591.

12. *Id.* at 593-94.

13. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999).

is reliable.¹⁴ Moreover, the Court reiterated in *Kumho Tire* that such factors are intended to be helpful but nonexhaustive. The *Kumho Tire* Court stated:

[A] trial court *may* consider one or more of the more specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability. But, as the Court stated in *Daubert*, the test of reliability is "flexible," and *Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides *how* to determine reliability as it enjoys in respect to its ultimate reliability determination.¹⁵

A few years after establishing the *Daubert* standard, the Supreme Court revisited the flexibility of *Daubert* in *General Electric Co. v. Joiner*.¹⁶ In *Joiner*, the Court considered an Eleventh Circuit decision in which the circuit court held that the district court erred in excluding the testimony of the respondent's expert witness.¹⁷ The Eleventh Circuit applied the abuse of discretion standard of review, but found that "because the Federal Rules of Evidence governing expert testimony display a preference for admissibility, we apply a particularly stringent standard of review to the trial judge's exclusion of expert testimony."¹⁸

Further emphasizing the flexibility of *Daubert*, the Supreme Court found that the appellate court had erred in applying an overly "stringent" review to the district court's ruling.¹⁹ First, the Court held that an appellate court cannot categorically distinguish between rulings allowing expert testimony and those excluding it when applying the abuse of discretion standard.²⁰ Second, the Court held that, in applying a stringent standard, the appellate court failed to give the trial court "the deference that is the hallmark of abuse-of-discretion review."²¹ Noting that the *Daubert* decision did not address the standard of appellate review for evidentiary rulings, the Court established that abuse of discretion is the appropriate standard in reviewing a trial court's decision to either exclude or admit expert testimony under *Daubert*.²²

14. *See id.* at 141-42; *Daubert*, 509 U.S. at 594.

15. *Kumho Tire Co.*, 526 U.S. at 141-42.

16. 522 U.S. 136 (1997).

17. *Id.* at 140.

18. *Id.* (quoting *Joiner v. Gen. Elec. Co.*, 78 F.3d 524 (11th Cir. 1996)).

19. *Id.* at 143.

20. *Id.* at 142.

21. *Id.* at 143.

22. *Id.* at 142-43.

III. The History and Development of the *Daubert* Standard in Oklahoma

Although the *Daubert* standard is relatively new to Oklahoma civil cases, it is not new to Oklahoma state courts. In 1995, the Oklahoma Court of Criminal Appeals²³ adopted the *Daubert* standard in *Taylor v. State*.²⁴ The court of criminal appeals decided that the *Daubert* standard would provide a more uniform way for courts to address the admissibility of scientific expert testimony and evidence.²⁵ The court also determined that trial judges must continue to act as gatekeepers, ensuring that novel scientific evidence is both reliable and relevant.²⁶ The court further found that a pretrial hearing was necessary to determine whether the testimony or evidence met the two-pronged test of reliability and relevance.²⁷

The attractiveness of the *Daubert* standard to the court of criminal appeals was its structured, yet flexible approach.²⁸ In *Taylor*, the court addressed the complex scientific issue of DNA match evidence analysis. In doing so, the court found that the particular evidence was novel, and because the court had not previously considered the reliability of such evidence, it required a pretrial hearing.²⁹

Notably, the court did not require such a hearing for the testimony of every expert witness to be deemed admissible. Rather, the court required a pretrial hearing only for *novel* scientific evidence.³⁰ Therefore, if the court had

23. In Oklahoma, the court of criminal appeals has exclusive appellate jurisdiction regarding all criminal matters, and thus, the Oklahoma Supreme Court does not typically hear criminal cases. See OKLA. CONST. art. 7, § 4.

24. 1995 OK CR 10, 889 P.2d 319.

25. *Id.* ¶ 16, 889 P.2d at 329.

26. *Id.* ¶ 17, 889 P.2d at 329.

27. *Id.* ¶ 44, 889 P.2d at 339.

28. *Id.* ¶ 15, 889 P.2d at 328.

29. *Id.* ¶ 44, 889 P.2d at 339. The court explained the reason for such a hearing when it considered novel scientific evidence:

The purpose of this hearing will be to determine whether such evidence is sufficiently “reliable” and “relevant” to warrant admission. This evidence may be considered “reliable” if it is grounded in the methods and procedures of science. The “relevancy” component simply requires that scientific or technical evidence bear a valid scientific connection to the pertinent inquiry and thereby assist the trier of fact in assessing the issues. Finally, the trial court should consider whether the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. This Court will independently review a trial judge’s decision admitting or excluding novel scientific or technical evidence to determine whether it passes muster under *Daubert*.

Id.

30. *Id.*

previously determined that the scientific or technical evidence or method met the requisite reliability standard for admission, then such a hearing would be unnecessary.

The Oklahoma Court of Criminal Appeals further incorporated *Daubert* and its progeny in the case of *Gilson v. State*.³¹ In *Gilson*, the court determined that, based on *Kumho Tire*, the *Daubert* standard extended to testimony based on “technical” and “other specialized” knowledge.³² Notably, the court in *Gilson* reviewed the trial court’s decision for abuse of discretion,³³ contrary to the *de novo* standard of review used by the court in *Taylor*.³⁴ The court provided no explanation for its change in standard of review, but only stated that it applied the abuse of discretion standard as set forth by *Kumho Tire*.³⁵

IV. Adoption of Daubert in the Oklahoma Civil Courts — Christian v. Gray

The early adoption and application of the *Daubert* standard in Oklahoma, as used in the state criminal court system, essentially followed the development of the standard as it progressed through the federal courts. In adopting the *Daubert* standard in the Oklahoma civil court system, the Oklahoma Supreme Court indicated in *Christian v. Gray* that it will similarly follow the gatekeeping standards established by the federal courts and applied by the Oklahoma criminal courts.³⁶

In *Christian*, the plaintiffs alleged that they suffered injury by inhaling airborne chemicals while attending the circus at the state fair arena.³⁷ The plaintiffs’ expert witness was a medical doctor who claimed that the plaintiffs’ permanent restrictive lung impairment was typical after exposure to certain inhalants, and that lime in the air at the state fair arena could have been one of those materials.³⁸ The defendants filed a motion in limine to exclude the testimony of the plaintiffs’ expert witness on the basis that the defendants did not cause the plaintiffs’ injuries.³⁹ The trial court granted the defendants’ motion and stated that the expert was incompetent to provide a medical opinion on the cause of the plaintiffs’ lung injuries.⁴⁰ The plaintiffs appealed

31. 2000 OK CR 14, 8 P.3d 883.

32. *Id.* ¶¶ 64-68, 8 P.3d at 907-08.

33. *Id.* ¶ 68, 8 P.3d at 908.

34. *Id.* n.5, 8 P.3d at 908 n.5.

35. *Id.*

36. *Christian v. Gray*, 2003 OK 10, ¶ 11, 65 P.3d 591, 599-600.

37. *See id.* ¶ 1, 65 P.3d at 594.

38. *Id.* ¶ 16, 65 P.3d at 601.

39. *Id.* ¶ 2, 65 P.3d at 594.

40. *Id.*

the trial court's decision, and the Oklahoma Supreme Court granted certiorari.⁴¹ In granting certiorari, the supreme court warned that it was not assuming the role of a "pre-trial reviewing court" for motions in limine, but instead assumed jurisdiction because of the importance of the first impression issue "for a procedure to be used by courts statewide"⁴²

The supreme court first had to determine whether *Daubert* was the proper standard by which to judge the admissibility of the proffered expert testimony.⁴³ The court noted the similarities between the Oklahoma Evidence Code and the Federal Rules of Evidence.⁴⁴ In justifying the application of *Daubert* in state civil cases, the court explained that federal court decisions construing federal evidence rules, which are substantially similar to Oklahoma rules, can be examined for persuasive value.⁴⁵ The court also stated that the "[Oklahoma] Evidence Code currently recognizes the gatekeeping capacity of a trial judge, and *Daubert* is but a refinement of this role."⁴⁶

In accepting the *Daubert* standard, the court made several references to the court of criminal appeals' previous adoption and its finding that the standard should be applied to all novel expert testimony.⁴⁷ The court ultimately agreed with the court of criminal appeals that the Oklahoma Evidence Code did not distinguish between "scientific," "technical," or "other specialized" knowledge, and therefore, a *Daubert* inquiry applied to *all* novel expert testimony.⁴⁸

The court found that the Oklahoma Evidence Code contains the same requirement as *Daubert*, which requires the trial court to determine the preliminary questions regarding the proposed expert's qualifications and admissibility of evidence, relating to both relevance and reliability.⁴⁹ In sum, the court stated, "Nothing in *Daubert* or *Kumho* conflicts with our Evidence Code. Our Court of Criminal Appeals has already adopted *Daubert* for criminal proceedings in Oklahoma Courts. Today we likewise adopt *Daubert*

41. *Id.* ¶ 0, 65 P.3d at 594.

42. *Id.* ¶ 3, 65 P.3d at 596.

43. *Id.* ¶ 4, 65 P.3d at 597.

44. *Id.* ¶ 6, 65 P.3d at 597 (noting that rules 2703 and 2704 in the Oklahoma Evidence Code are identical to FRE 703 and 704; that rule 2702 is "identical in substance" to FRE 702; and that rule 2705 has slightly different language than FRE 705, but the same substantive meaning).

45. *Id.*

46. *Id.* ¶ 9, 65 P.3d at 599.

47. *Id.* ¶ 11, 65 P.3d at 599.

48. *Id.* ¶ 10, 65 P.3d at 599.

49. *Id.* ¶ 9, 65 P.3d at 598.

and *Kumho* as appropriate standards for Oklahoma trial courts in deciding the admissibility of expert testimony in civil matters.”⁵⁰

A. Application and Satisfaction of the Daubert Standard

After determining that *Daubert* was the proper standard, the Oklahoma Supreme Court defined what must be shown to satisfy the *Daubert* standard.⁵¹ The factors the court found the trial court should consider in satisfying *Daubert* include: (1) determining the relevancy of the expert testimony; (2) determining the reliability of the expert testimony; and (3) applying the factors that the trial court has identified to the evidence or expert at issue.

First, the trial court must determine whether the expert testimony is relevant. Relying on *Daubert*, the *Christian* court found that the evidence must assist the trier of fact and that this requirement “goes primarily to relevance.”⁵² Further, the court held that, like *Daubert*, the determination of the expert’s qualifications is also a preliminary question the trial court must address.⁵³ Under Rule 2105 of the Oklahoma Evidence Code, which the court found to be similar to FRE 104, both relevance of the expert’s testimony and expert qualifications are preliminary questions.⁵⁴

Once a trial court has determined that the evidence is relevant, the court must then address its reliability. The *Christian* court held that a *Daubert* inquiry is only required for *novel* expert testimony, stating that “a *Daubert* challenge includes an *initial* determination of whether the expert’s method is one where reliability may be taken for granted.”⁵⁵ Simply stated, courts need not engage in a judicial reinvention of the wheel for every proffered expert. If the testimony, methodology, or technique is *not* novel, then there is no need for a *Daubert* inquiry concerning reliability.

If it is novel, however, courts must identify the appropriate factors to apply to the expert’s methodology or technique to determine whether the evidence

50. *Id.* ¶ 14, 65 P.3d at 600.

51. *Id.* ¶ 40, 65 P.3d at 608. The court did not outline a definite procedure or chronological order that a trial court must follow in applying the *Daubert* standard. It is important that a *Daubert* inquiry proceed in a logical manner, however, so that the parties and courts do not waste time and effort on evidentiary issues that do not clear the most basic preliminary hurdles. Certainly, a successful challenge to the admission of expert testimony may depend on the challenger skillfully leading a court through the maze of *Daubert* considerations.

52. *Id.* ¶ 9, 65 P.3d at 598. *Daubert* held that expert testimony must “fit” the issues in the case. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591 (1993).

53. *Christian* ¶ 9, 65 P.3d at 598.

54. *Id.*

55. *Id.* ¶ 11, 65 P.3d at 600 (emphasis added).

is reliable.⁵⁶ The *Christian* court held that “the *Daubert* factors are not a rigid standard applicable in every case”;⁵⁷ instead “[t]he *Daubert* factors “may” bear on a judge’s gatekeeping determinations” but that will “all depend ‘on the nature of the issue, the expert’s particular expertise, and the subject of his testimony.’”⁵⁸

Thus, a court must tailor the factors based on the nature of the controversy, including any or all *Daubert* factors, to determine the reliability of the evidence. In determining such factors, the court must ensure that the expert did not create his methodology or technique simply for the sake of trial. Instead, the expert’s testimony must meet the same “intellectual rigor” the expert would use in the “real world” within the relevant discipline. In answering the self-posed question, “[H]ow can the courts effectively police the system?,” one commentator notes that “[t]hey can separate reliable expert testimony from the unreliable by employing the objective rules and standards that exist outside the courtroom.”⁵⁹

Finally, the trial court must apply the factors it has identified to the evidence or expert at issue. In doing so, the trial court must specifically state the facts found and used to support its order. The *Christian* court found it difficult to determine the facts that supported the trial court’s decision because the trial court did not clearly state those facts. The court stated that “[w]hen a trial court applies *Daubert* and determines that a particular method is required for the admissibility of a particular expert’s conclusions the order should state those facts that the trial court relied upon in making that determination.”⁶⁰

B. Analysis of the Standard of Review

In addressing the proper standard of review, the *Christian* court held that the abuse of discretion standard applies in reviewing a trial court’s ruling to either admit or exclude expert testimony.⁶¹ The court explained that the abuse of discretion standard requires the appellate court to further examine whether the trial court determined an issue of law or fact.⁶² Then, after determining

56. *Id.* ¶ 13, 65 P.3d at 600.

57. *Id.*

58. *Id.* (quoting FED. JUDICIAL CTR., REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 19 (2d ed. 2000)).

59. Michael E. Gebauer, *The “What” and the “How” of Challenges to Expert Testimony Under Rule 702*, 43 FOR THE DEF., July 2001, at 13, 15.

60. *Christian* ¶ 47, 65 P.3d at 610.

61. *Id.* ¶ 42, 65 P.3d at 608.

62. *Id.* ¶ 51, 65 P.3d at 611.

whether the trial court determined an issue of fact or law, the court found that the appeals court “must determine if a deferential or a non-deferential *de novo* review applies to the particular adjudication of fact, and to an issue of law [the court will] apply a non-deferential *de novo* standard.”⁶³

In applying *Daubert*, a trial court is called upon to determine issues of fact.⁶⁴ The court in *Christian* found that each of the articulated *Daubert* factors involves determining issues of fact.⁶⁵ Depending on the type of factual determination, however, the court will use a deferential or nondeferential *de novo* review standard.⁶⁶ The *Christian* court noted that the trial court did not clearly state why the conclusions of the expert were not appropriate for the method or why the method itself was unreliable.⁶⁷ However, it was clear that the trial court rejected the testimony of the plaintiffs’ expert witness because, among other reasons, the expert had no baseline pulmonary data or study to show what the plaintiffs’ pulmonary functions were before the lime exposure.⁶⁸ The trial court found that such a study was necessary to show that airborne lime at the circus had in fact caused the plaintiffs’ pulmonary injury.⁶⁹ The Oklahoma Supreme Court, however, found that no facts were before the trial court demonstrating that such a test was considered necessary “by the relevant community of experts, or by satisfaction of any of the other *Daubert* factors.”⁷⁰ Accordingly, the supreme court concluded that the trial court determined this issue based upon a fact not of record, and as such, abused its discretion.⁷¹

The trial court determined, to the extent it found the baseline data necessary to support the expert’s conclusion, that a reasonable person could not find a causal link without such a study.⁷² In other words, the trial court’s determination that there was a lack of causation went directly to the plaintiffs’ inability to show cause in fact of the claimed injury, and thus was a legal issue.⁷³

Based on its prior discussion regarding the appropriate standard of review, the Oklahoma Supreme Court found the lower court to be in error based on a

63. *Id.*

64. *Id.* ¶ 46, 65 P.3d at 609.

65. *Id.*

66. *Id.* ¶¶ 41-47, 65 P.3d at 608-10.

67. *Id.* ¶ 47, 65 P.3d at 610.

68. *Id.* ¶ 49, 65 P.3d at 610.

69. *Id.* ¶ 52, 65 P.3d at 611-12.

70. *Id.* ¶ 52, 65 P.3d at 612.

71. *Id.*

72. *Id.*

73. *Id.*

nondeferential de novo standard.⁷⁴ In so concluding, the court provided the plaintiffs with an opportunity to show either general causation or that such a showing was not necessary for the admissibility of the particular expert's testimony.⁷⁵ The court further charged the parties with the responsibility of "framing the issues for the trial court and identifying controverted issues as either fact or law."⁷⁶

C. *The Majority's Analysis of Causation*

After determining that *Daubert* was the appropriate standard to adopt, the supreme court did not spend time engaging in a theoretical or abstract discussion of the standard's application. Instead, the court clearly framed the opinion, especially the part regarding the appropriate standard of review, as it related to the causation issues in dispute. Therefore, it is important to understand the court's analysis of the causation issue in the context of its decision.

The court divided allegations involving injuries from a person's exposure to harmful substances into general and specific causation.⁷⁷ General causation is whether a substance can cause a particular injury to the general public, whereas specific causation is whether a substance caused an injury to a particular person.⁷⁸ The court held that general causation should be shown unless it is found to be inappropriate.⁷⁹ The court did not, however, offer specific examples of controversies where general causation would be inappropriate.⁸⁰

The plaintiffs' expert provided evidence of lime at the arena eighteen days after the alleged inhalation, discounted a viral infection as the cause of the injury because no evidence of bacteria was found in the plaintiffs, and examined plaintiffs' past medical history.⁸¹ The defendants specifically challenged the plaintiffs' expert based on general causation, and thus, the burden rested with the plaintiffs to show either general causation or that general causation was not necessary for the admission of the expert's testimony.⁸² The trial court found that the plaintiffs' expert failed to establish

74. *Id.*

75. *Id.* ¶ 54, 65 P.3d at 612 (issuing a writ of prohibition).

76. *Id.* ¶ 55, 65 P.3d at 612.

77. *Id.* ¶ 21, 65 P.3d at 602.

78. *Id.*

79. *Id.* ¶ 26, 65 P.3d at 604.

80. *Id.* ¶ 23, 65 P.3d at 603.

81. *Id.* ¶ 16, 65 P.3d at 601.

82. *Id.* ¶ 23, 65 P.3d at 603.

either general or specific causation for two reasons: (1) the expert failed to explain a method for determining the amount of lime that could result in an injury, and (2) he failed to explain a method for his conclusion that sufficient amounts of lime were present to cause the plaintiffs' injuries.⁸³

The *Christian* court found the trial court's ruling unclear on whether (1) the facts the expert did not know were necessary as part of a proper method, (2) the conclusion of the expert was analytically inappropriate based on what he did know, or (3) both.⁸⁴ Thus, the court assumed the trial court found flaws in both methodology and conclusions. Assuming reliability could not be taken for granted and the expert's method for his conclusions was novel, the court held that expert testimony was necessary.⁸⁵ Expert testimony was necessary to show the injury was caused from exposure to a toxin and that there was a reliable method for determining the amount of toxin necessary to cause such an injury, unless the plaintiffs could demonstrate that this showing of general causation was inappropriate.⁸⁶ Additionally, the court agreed that the expert's testimony must "be analytically appropriate for the expert's method."⁸⁷

The court found that whether a party has satisfied *Daubert* depends upon two determinations by the trial court.⁸⁸ First, the court must determine what method is required by *Daubert* for the type of controversy, and then, whether the expert's method supports the expert's conclusion about causation.⁸⁹ The court stated that "[a]pplication of a standard of review to these determinations requires us to distinguish fact from law and whether cause in fact is determined as an issue of fact or as an issue of law."⁹⁰ The court further explained that an expert's opinion may lack sufficient facts for legal validation "because of at least one of two reasons, (1) [i]t is without, or not based upon, facts necessary for the method or technique used by the expert, or (2) [t]he facts do not support the conclusion of the expert."⁹¹

83. *Id.* ¶ 35, 65 P.3d at 606.

84. *Id.* ¶ 37, 65 P.3d at 607.

85. *Id.* ¶ 38, 65 P.3d at 607.

86. *Id.*

87. *Id.*

88. *Id.* ¶ 40, 65 P.3d at 608.

89. *Id.*

90. *Id.*

91. *Id.* ¶ 51, 65 P.3d at 611.

V. Application of *Daubert* in the Oklahoma Civil Courts

The Oklahoma Supreme Court has not yet extended, interpreted, or further explained the *Christian* opinion regarding expert testimony.⁹² Similarly, the appellate courts have not had the opportunity to publish opinions regarding the resolution of evidentiary disputes after *Christian*.

Nevertheless, the recent decision of the Oklahoma Court of Civil Appeals in *Twyman v. GHK Corp.*⁹³ is of interest in examining how Oklahoma courts may apply the *Christian* decision. In *Twyman*, the appellate court found that a trial court should apply the *Daubert* standard retrospectively.⁹⁴ Although the trial concluded before the adoption of *Daubert* by the Oklahoma Supreme Court in *Christian*, the appellate court determined that the need for scientifically reliable expert evidence warranted the retroactive application of *Christian* and the *Daubert* standard.⁹⁵ As support for its retroactive application, the court noted that “*Daubert* was decided almost ten years before trial here and its possible adoption in various states has been discussed widely during that period”; thus, the adoption of *Daubert* standards in *Christian* was not a “bolt out of the blue.”⁹⁶ However, in seeking direction from the Oklahoma Court of Criminal Appeals, the court noted that the court of criminal appeals never determined whether it would apply *Daubert* retrospectively to novel scientific evidence.⁹⁷

In *Twyman*, the plaintiffs were dairy farmers who claimed that pollutants from the defendants’ oilfield contaminated their farm’s well and resulted in the death of a significant portion of their dairy cows.⁹⁸ The jury found in

92. The Oklahoma Supreme Court, however, did rely on the *Christian* case for its opinion in *Tibbetts v. Sight ‘n Sound Appliance Centers, Inc.*, 2003 OK 72, 77 P.3d 1042, although the case had nothing to do with the admissibility of expert testimony. Instead, the court used the *Christian* case as its authority for the application of the nondeferential de novo standard of review to a question of law. *Id.* ¶ 4, 77 P.3d at 1046. In citing *Christian*, the court noted that “an abuse of discretion review standard includes appellate examination of both fact and law issues” and that a de novo review standard applies when an assigned error is one of law. *Id.* ¶¶ 3-4, 77 P.3d at 1046. The court explained that a de novo review standard was applicable because the “overriding and critical factor of the results obtained is undisputed and leads to only one rational conclusion as to what a reasonable fee should be” *Id.*

93. 2004 OK CIV APP 53, 93 P.3d 51.

94. *Id.* ¶ 8, 93 P.3d at 54.

95. *Id.* ¶ 17, 93 P.3d at 56.

96. *Id.* ¶ 14, 93 P.3d at 55.

97. *Id.* ¶ 20, 93 P.3d at 56.

98. *Id.* ¶¶ 1-3, 93 P.3d at 53.

favor of the plaintiffs.⁹⁹ The defendants appealed, claiming that the trial court erred in admitting expert scientific testimony on causation that failed to meet the reliability standards set forth in *Daubert*.¹⁰⁰

After finding that *Daubert* standards were applicable, the court considered whether the expert testimony in controversy satisfied these standards. The expert testimony in question related to two experts, both of whom were veterinary doctors.¹⁰¹ The court noted that one of the experts admitted he developed his scientific theory of “synergistic effect,” relating to why the cows were sick, while working on this investigation and that he could not attribute his theory to any particular individual.¹⁰² In applying the scientific reliability factors set forth in *Daubert* to this expert’s testimony, the court found:

[The expert] was not aware of any scientific literature that supported the synergism theory with respect to the components involved and the effect on animals, and was also not aware of anyone else advancing such a theory. There is no evidence this theory has been tested in any manner, nor does there appear to be any reason why it could not have been tested. There has been no peer review outside the body of [the plaintiffs’] own experts. In that it is an entirely new theory, it obviously does not have general or widespread acceptance in the relevant scientific community.¹⁰³

The court explained that the expert’s diagnostic methodology was at best suspect because he failed to consider other possible causes for the cows’ health problems during the differential diagnosis.¹⁰⁴

The court also stated that the other expert’s testimony was equally unresponsive of scientific reliability.¹⁰⁵ During his testimony regarding his theory about the cows’ sicknesses, the expert indicated that radiation might be one possible cause but that he could not say how much radiation was in the water the cows actually consumed.¹⁰⁶ He also stated that no analysis had been performed on the well water at the time of the alleged injury and, therefore, one could only speculate about the amounts of radiation in the water.¹⁰⁷ The

99. *Id.* ¶ 4, 93 P.3d at 53-54.

100. *Id.* ¶ 1, 93 P.3d at 53.

101. *Id.* ¶ 29, 93 P.3d at 58.

102. *Id.* ¶ 31, 93 P.3d at 58.

103. *Id.* ¶ 32, 93 P.3d at 58.

104. *Id.* ¶ 34, 93 P.3d at 58.

105. *Id.* ¶ 38, 93 P.3d at 59.

106. *Id.* ¶ 39, 93 P.3d at 59.

107. *Id.*

court found this expert's theory had the "uncertainty of *possible* causation based on the uncertainty of an unproven assumption" and, therefore, did not meet the standards set forth in *Daubert*.¹⁰⁸ Additionally, the court found this expert, like the other expert, failed to consider the alternative explanation set forth in the expert report provided by the defendants.¹⁰⁹

Because the court held that evidence provided by both of the plaintiffs' experts did not meet the admissibility standards of *Daubert*, the plaintiffs lacked evidence sufficient to establish the requisite causation between the defendants' actions and the plaintiffs' losses.¹¹⁰ The court reversed the trial court's ruling and directed the trial court to enter judgment in favor of the defendants.¹¹¹

VI. Conclusion

The Oklahoma Supreme Court has unequivocally determined the standard for the admission of expert testimony in Oklahoma. In adopting *Daubert*, the *Christian* court explained that Oklahoma trial courts, like their federal counterparts, must ensure that expert evidence is both relevant and reliable. In doing so, courts must stray from the rigid *Frye* standard, and instead, apply the flexible *Daubert* approach.

The Oklahoma Supreme Court also held that it intends to follow all aspects of the federal application of the *Daubert* standard. Most notable is the court's multitiered approach to the standard of review. In applying the abuse of discretion standard, the appellate courts must determine the issues decided and facts used in support of the trial court's decision. Then, depending upon whether there has been a determination as to a matter of fact or law, the courts must apply a clear abuse of discretion, deferential de novo, or nondeferential de novo standard. All of these standards, however, fall within an abuse of discretion analysis, although it is clear that some are more stringent than others. The shifting between the more-stringent to less-stringent standard appears to be at odds with the U.S. Supreme Court's decision in *General Electric Co. v. Joiner*. Further, the Oklahoma Supreme Court has left unanswered the question of how an appellate court should approach the resolution of a mixed question of law and fact.

Nevertheless, in applying *Daubert* in Oklahoma civil courts, practitioners and trial courts have the benefit of over ten years of case law interpreting the

108. *Id.* ¶ 41, 93 P.3d at 59-60.

109. *Id.* ¶ 42, 93 P.3d at 60.

110. *Id.* ¶ 51, 93 P.3d at 61.

111. *Id.* ¶ 52, 93 P.3d at 61.

Daubert standard. According to *Christian*, the court finds persuasive value in federal court decisions applying federal rules similar to those of Oklahoma. As such, the court will likely find some persuasiveness in the prior decisions of the Oklahoma federal district courts and the Tenth Circuit Court of Appeals, which have both been applying *Daubert* since its inception. Further, although not bound by any decision of the court of criminal appeals, the *Christian* court agreed with several decisions and the overall application of *Daubert* by the Oklahoma Court of Criminal Appeals. Therefore, when confronted with undecided issues regarding the admissibility of expert testimony, persuasive guidance from the application of *Daubert* in Oklahoma within the criminal context may assist Oklahoma practitioners and trial courts.

