

**GEORGIA'S EXPERT WITNESS STATUTE,  
AND ITS INTERPRETATION BY GEORGIA'S COURTS**

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## **I. INTRODUCTION**

It has been four years now since the General Assembly adopted what is commonly referred to as the federal *Daubert* standard to govern the admissibility of expert witness testimony. The stated intent of the statute was to make it so that Georgia was not a venue for the receipt of expert witness testimony that would not be admissible in the courts of other states or in the federal courts. It attempts to do this by tracking federal rule of evidence 702 and federal case law, by adopting the federal practice of having *Daubert* hearings at a time between the end of discovery and prior to trial, and by directing the Georgia courts to consider the decisions of other jurisdictions. Because the statute was only adopted several years ago, there are a limited number of appellate decisions, but if a theme can be discerned from these cases, it is that the courts are holding that General Assembly did not adopt *Daubert* per se, but instead adopted O.C.G.A. § 24-9-67.1, and directed that the courts *may* refer to *Daubert* and other cases to interpret that statute. The Georgia courts seem reluctant to put the judge in the role of finder of fact and judge of credibility.

## **II. RECENT GEORGIA EXPERT WITNESS CASES**

### **Condra v. Atlanta Orthopaedic Group, P.C., --Ga.--, -- S.E.2d --, 2009 WL 1834217 (2009)**

This case reverses Georgia's old evidentiary rule that an expert's personal practices are inadmissible. The reasoning behind that rule was that the issue for the jury was whether the defendant violated the standard of care in the professional community, and what one particular professional did had no bearing on the general

standard. In this case, a doctor was sued and the claim was that the plaintiff's injuries were a result of the doctor's failure to perform blood count monitoring during a course of medication therapy. The defense expert testified that blood count monitoring was reasonable, but not the standard of care in the profession. However, discovery had elicited that the defense expert himself did conduct blood monitoring when performing the therapy. The trial court and the court of appeals held that the evidence of the expert witness's personal practice was inadmissible, but the Supreme Court reversed, acknowledging that O.C.G.A. § 24-9-67.1 directs courts to consider the holdings of federal courts on the matter. Therefore, it is now permissible to inquire into the expert's personal practices in determining the credibility of the expert's opinion.

**Hamilton-King v. HNTB Georgia, Inc., 296 Ga.App. 864, 676 S.E.2d 287 (2009)**

Injured motorists and the estate of a deceased motorist brought a negligence action against an architectural engineering firm and contractor arising out of an accident that occurred on a bridge that was being widened. The facts of the case were horrific. The plaintiffs and decedent were driving at night along a 900-foot bridge over the Little Satilla River. There was neither shoulder nor any lighting along the bridge. The plaintiffs swerved to avoid a car drifting into their lane, hit part of the bridge (which did not have reflectors), and then came to rest in a lane of travel. There was no shoulder to move the car to, or for the plaintiffs or decedent to use to get out of the traffic. An off-duty police officer saw the situation and brought lights and reflectors; however, another car came along, hit the officer, and then hit the plaintiffs and decedent.

The plaintiffs' expert opined that the safety controls established for the construction project did not conform with the industry standard. The defendants moved to exclude the expert witness testimony, claiming that he was not qualified to offer an opinion regarding the traffic control plans, even though he had obtained his engineering degree from Notre Dame and spent 48 years of his career working for various government transportation agencies. The trial court found him to be "marginally qualified" but went on to exclude his testimony after rigidly applying such apparently inapplicable *Daubert* factors as whether the theory or technique can be and has been tested, whether the theory or technique has been subjected to peer review and publication, the potential rate of error, and general acceptance in the relevant scientific community. After holding the expert testimony inadmissible, the trial court then granted summary judgment for the defense.

The court of appeals reversed, chiding the trial court for too rigidly applying the standards set forth in *Daubert*. The court of appeals affirmed that the determination of whether an expert opinion was appropriately admissible was a flexible one guided by the statutory criteria of whether or not the testimony is given by an expert who has reliably applied accepted principles and methods to the facts of the case. Once these criteria are met, the opinion is admissible, and the issues raised by the defense were properly matters of cross-examination for trial (and the jury).

**CSX Transp., Inc. v. McDowell, 294 Ga.App. 871, 670 S.E.2d 543 (2008)**

This case holds that the trial court is not required to issue detailed findings in order to deny a motion to exclude a witness under O.C.G.A. § 24-9-67.1

**Agri-Cycle LLC v. Couch, 284 Ga. 90, 663 S.E.2d 175 (2008)**

This is a case brought by the EPD to enjoin Agri-Cycle, LLC from receiving waste. The trial court granted an interlocutory injunction preventing the business' operations, and it appealed. One of the issues raised was whether EPD's expert was able to give an expert opinion under Georgia law. The defense objected because the EPD scientist was not an engineer. The trial court held that he was an expert on biologic and anaerobic processes, then allowed the scientist to testify, which amounted to the identification of photographs taken at the site. The Supreme Court rejected the *Daubert* challenge out of hand, holding that whether an expert has sufficient credentials to render a particular expert opinion is within the broad discretion of the trial judge, and generally goes to the weight, rather than the admissibility, of the witness.

**Long v. Natarajan, 291 Ga.App. 814, 662 S.E.2d 876 (2008)**

This was a case against a doctor, but it was not treated as medical malpractice. The plaintiff-patient had gone to the defendant for surgery. While in surgery, the doctor noticed an abscess on the plaintiff's buttocks. Deciding that removal of the abscess was medically necessary, and because the plaintiff had experienced difficulty being intubated which would likely recur if the abscess was removed in a subsequent surgery, the doctor

went ahead and removed the abscess. The plaintiff then sued, arguing this resulted in a painful wound that she had not asked the doctor to treat. In response to a summary judgment motion, the plaintiff supplied an affidavit by her family doctor that summarily opined that treatment of the abscess was not medically necessary. The affidavit was extremely cursory, being less than 1 ½ pages long, not listing the family doctor's credentials, surgical experience, or reasoning for determining that the treatment of the abscess was not medically necessary. Based upon this, the court of appeals affirmed the trial court's decision that the affidavit was not admissible, and subsequent grant of summary judgment. The affidavit did not provide sufficient information for the court to determine whether the opinion applied reliable principles to the facts in a reliable manner, as required by the statute.

**Muskett v. Sketchley Cleaners, Inc., --Ga.App.--, 677 S.E.2d 731 (2009)**

This is a slip and fall case in which the plaintiff was a lawyer representing himself. The trial court refused to allow the plaintiff to introduce the deposition testimony of one of his orthopedists under OCGA § 24-9-67.1(b) on the grounds that the prominent doctor had been retired and unlicensed for a number of years. The court of appeals did not reach the issue of whether that exclusion was appropriate; instead, that court ruled that the testimony was cumulative of other experts presented at trial, and so it was harmless.

**Houston v. Phoebe Putney Memorial Hosp., Inc., 295 Ga.App. 674, 673 S.E.2d 54 (2009)**

This was a medical malpractice action, which of course required the filing of an expert affidavit of professional negligence with the initial pleading. The trial court applied the *Daubert* standard to that affidavit, found it did not meet that standard, and therefore dismissed the case. The court of appeals reversed, holding that the *Daubert* standard does not apply to affidavits of professional negligence required to be filed with the complaint. Conclusory opinions, which would not be admissible under *Daubert*, are permissible in the affidavit of professional negligence.

**Dawson v. Leder, 294 Ga.App. 717, 669 S.E.2d 720 (2008)**

In professional malpractice actions, the expert must have actual expertise in the narrow area where the expert opinion is to be provided. In the context of medical malpractice, this case holds that what is needed is substantial expertise performing the particular procedure that is in issue. In this case, the area of expertise was defined to be extraordinarily narrow: post-operative airway management. Based upon this narrow definition of the area, an imminently qualified doctor was found not to be competent to render the particular opinion. The doctor had been a licensed and practicing surgeon for a number of years, taught surgery to medical students, and was a co-director of the Grady Health System ICU. However, she had only had to perform procedures related to post-operative airway management a few times, and so the court held that her opinion was inadmissible.

See also Akers v. Elsey, 294 Ga.App. 359, 670 S.E.2d 142 (2008)

**Giannotti v. Beleza Hair Solon, Inc., 296 Ga.App. 636, 675 S.E.2d 544, 9 FCDR 1039 (2009)**

The patron of a hair salon and her husband sued the hair salon and a cosmetologist for personal injury and loss of consortium, alleging that the cosmetologist negligently performed hair-coloring procedures on patron, causing patron to suffer chemical burns. After a jury ruled in favor of the hair salon, plaintiff appealed and argued the trial court erred in excluding her expert chemist. The chemist performed tests to show what could happen if certain coloring chemicals were mixed and heated. On appeal, the court held that because it the chemist's experiments involved different chemicals than the ones used in the salon, and because the chemicals in the salon were not heated in the same manner as in the chemist's tests, his opinions were not the result of reliable principles applied reliable to the facts of the case, and affirmed.

**III. A FEDERAL PERSPECTIVE ON DAUBERT, FROM THE NORTHERN DISTRICT OF GEORGIA**

The following is a statement of the *Daubert* standard excerpted from a federal magistrate court judge's recommendation to the district court upon opposing motions to exclude expert witnesses. It is included here verbatim because Magistrate Judge Linda T. Walker provides a detailed synthesis of the federal case law explaining the purpose of the *Daubert* rule and the boundaries of the judge in performing the gatekeeper role. Of particular interest is the magistrate judge's direction that the fundamental purpose of Federal Rule 702, which *Daubert* interprets, is to facilitate expert testimony, rather than exclude it.

## STANDARD OF REVIEW<sup>1</sup>

The admissibility of expert testimony is governed by the rubric established in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). Pursuant to Federal Rule of Evidence 702, as well as Daubert and its progeny, "district courts must act as 'gatekeepers' [, admitting] expert testimony only if it is both reliable and relevant." Rink v. Chemivnova, Inc., 400 F.3d 1286, 1291 (11th Cir. 2005).

To fulfil their obligation under Daubert, district courts must engage in a rigorous inquiry to determine whether: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in Daubert; and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. Id. at 1291-92 (quoting City of Tuscaloosa v. Harcros Chems., Inc., 158 F.3d 548, 562 (11th Cir. 1998) (internal quotations omitted)). "The party offering the expert has the burden of satisfying each of these three elements by a preponderance of the evidence." Id. at 1292 (citing Allison v. McGhan Med. Corp., 184 F.3d 1300, 1306 (11th Cir. 1999)).

When ascertaining the reliability of a particular scientific expert opinion, there are four non-inclusive factors that courts should consider, to the extent possible: "(1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community." Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd., 326 F.3d 1333, 1341 (11th Cir. 2003) (citing McCorvey v. Baxter Healthcare Corp., 298 F.3d 1253,

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<sup>1</sup> City of Mountain Park, Georgia v. Lakeside at Ansley, LLC, et al., N.D. GA, Case 1:05-cv-02775-CAP; Document 693, Magistrate Judge's Order and Final Report and Recommendation.

1256 (11th Cir. 2002)). "Notably, however, these factors do not exhaust the universe of considerations that may bear on the reliability of a given expert opinion, and a federal court should consider any additional factors that may advance its Rule 702 analysis." Id. (citing Kumho Tire Co., Ltd. v. Charmichael, 526 U.S. 137, 150 (1999)). Yet, a "district court's gatekeeper role under Daubert 'is not intended to supplant the adversary system or the role of the jury.'" Maiz v. Virani, 253 F.3d 641, 666 (11th Cir. 2001) (quoting Allison, 184 F.3d at 1311). "[V]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." Allison, 184 F.3d at 1311 (quoting Daubert, 509 U.S. at 596). "The judge's role is to keep unreliable and irrelevant information from the jury because of its inability to assist in factual determinations, its potential to create confusion, and its lack of probative value." Id. at 1311-12; Finestone v. Fla. Power & Light Co., 272 F.App'x. 761, 767 (11th Cir. 2008). In addition, the Advisory Committee Notes to Rule 702 offer the following five factors for courts to consider on the issue of reliability:

- (1) Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;
- (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;
- (3) Whether the expert has adequately accounted for alternative explanations;
- (4) Whether the expert is being as careful as he would be in his regular professional work outside his paid litigation consulting; and

- (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. See Advisory Committee Notes, FED. R. EVID. 702 (2000 amendments ) (internal citations omitted).

Other factors that are considered in the Daubert analysis are reliance on anecdotal evidence (as in case reports), temporal proximity, and improper extrapolation (as in animal studies). Allison, 184 F .3d at 1312. Daubert decisions warn against leaping from an accepted scientific premise to an unsupported one. Id. at 1314. Nothing in either Daubert or the Federal Rules of Evidence requires a trial court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert. Id. at 1315. "A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." Id. at 1315-16. (citation omitted).

Also important to the trial court's inquiry is the relevance of the expert testimony, which entails two considerations. First, the evidence or testimony must "assist the trier of fact to understand the evidence or to determine a fact in issue." Daubert, 509 U.S. at 591. Second, it must be sufficiently linked to the facts of the case, meaning there can be no analytical gaps between the facts and the expert testimony. Id. at 591-92. In other words, the expert testimony must meet the legal and substantive issues in the case.

Finally, a key but sometimes forgotten principle of Rule 702 and Daubert is that Rule 702, both before and after Daubert, was intended to relax traditional barriers to admission of expert opinion testimony. See, e.g., id. at 588. Accordingly, courts are in agreement that Rule 702 mandates a liberal standard for the admissibility of expert testimony. See id. (Rule 702 is part of "liberal thrust" of Federal Rules of Evidence ); see generally 4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S

FEDERAL EVIDENCE § 702.02[1] (2d ed. 2005) (collecting cases). As the Advisory Committee Notes to Rule 702's 2000 amendments made clear, "[a] review of the case law after Daubert shows that the rejection of expert testimony is the exception rather than the rule." See Advisory Committee Notes, FED. R. EVID. 702 (2000 amendments).