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CAT IN THE HAT MOVES TO MICHIGAN;
EXPERT WITNESSES AND THEIR PROPONENTS
CURSE DR. SEUSS

*Susan H. Bitensky**

2002 L. REV. M.S.U.-D.C.L. 835

The water ran out.
And then I SAW THE RING!
A ring in the tub!
And, oh boy! What a thing!
A big long pink cat ring!
It looked like pink ink!
And I said, "Will this ever
Come off? I don't think!"

* * * *

It was all one big spot now
All over the yard!
But the Big Cat stood there
And he said, "This is good."¹

INTRODUCTION

In the popular children's book *The Cat in The Hat Comes Back*,² a rather presumptuous and decidedly mischievous cat creates a "big long pink cat ring"

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1. DR. SEUSS, *THE CAT IN THE HAT COMES BACK!* 14, 52 (1986).
2. *See id.*

in a bathtub, much to the consternation of the children whose bathtub it is.³
The cat assures them,

“Have no fear of that ring,”
Laughed the Cat in the Hat.
“Why, I can take cat rings
Off tubs. Just like that!”⁴

As it turns out, the cat’s efforts result in the pink ring spreading ominously, first to mom’s white dress,⁵ and then, one after the other, to a whole wall,⁶ dad’s shoes,⁷ the hall rug,⁸ dad’s bed,⁹ the television,¹⁰ and finally, to the snow surrounding the children’s house.¹¹ In short, the pink bathtub ring is transformed into a gigantic pink blob of a spot. The cat has made a not-so-bad mess unbelievably worse.

The cat in the hat is not alone in this regard. In my opinion, Michigan’s state legislature and courts have also made a not-so-bad mess much worse in relation to the rules on admitting expert witness testimony. However, the cat, with the assistance of some little hyperactive cats residing in the big cat’s hat,¹² is ultimately able to get rid of the pink spot.¹³ If only Michigan were so lucky! Its “pink spot” has not even begun to fade.

I. THE EXTENT OF THE “PINK SPOT” IN MICHIGAN

In order to understand what Michigan has done, it is necessary to understand how the United States Supreme Court has interpreted the Federal Rules of Evidence (FRE) governing admissibility of expert witness testimony. Reviewing this background is important because the architects of Michigan’s rules on this subject appear to have used the U.S. Supreme Court’s interpretations as a springboard for fashioning a Michigan variant or two.

The federal judicial precedents to which I refer are now thought of as a ground breaking trilogy in evidence law: *Daubert v. Merrell Dow*

3. *Id.* at 14.

4. *Id.* at 16.

5. *See id.* at 16, 19.

6. *See id.* at 21.

7. *See DR. SEUSS, supra* note 1, at 23.

8. *See id.* at 24-25.

9. *See id.* at 28-29.

10. *See id.* at 38.

11. *See id.* at 40.

12. *See id.* at 32-63.

13. *See DR. SEUSS, supra* note 1, at 59, 61.

Pharmaceuticals, Inc.,¹⁴ *General Electric Co. v. Joiner*,¹⁵ and *Kumho Tire Co. v. Carmichael*.¹⁶ *Daubert*, in ruling on the admissibility of expert opinion that Bendectin causes birth defects, is most famous for rather unceremoniously tossing out the *Frye* test¹⁷ as the gold standard for judging the admissibility of novel scientific expert testimony under Rule 702 of the Federal Rules of Evidence (FRE 702).¹⁸ *Frye* actually predated the codified FRE by half a century, being derived from a 1923 citation-free decision in *Frye v. United States*¹⁹ by the United States Court of Appeals for the District of Columbia.²⁰ Thus, *Frye* did double duty, initially by guiding the common law development of evidentiary principles and then in fleshing out our early understanding of FRE 702 vis-à-vis admissibility of scientific expert testimony.²¹

The *Frye* case arose over the question of admissibility of expert opinion testimony predicated upon the results of the systolic blood pressure deception test, a primitive precursor to the polygraph machine.²² The *Frye* court came up with a standard for distinguishing when the basis of an expert's proffered scientific opinion testimony would be reliable enough so as to warrant admitting the testimony into evidence. *Frye* dictated that the basis for such testimony "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."²³

Frye arose and gained currency, of course, to help judges determine what is "junk science" and what is not – the former posing a danger of unduly impressing jurors because it parades as science when it really is not. The *Frye* test makes good sense in certain respects; the test implicitly recognizes that most judges are not trained as scientists, and that, therefore, it might be a valid idea for the sorting process to belong to the scientific community rather than to jurists.²⁴

14. 509 U.S. 579 (1993).

15. 522 U.S. 136 (1997).

16. 526 U.S. 137 (1999).

17. The *Frye* test was announced in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923). The substance of the test appears in the text above.

18. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 585, 589, 597 (1993).

19. 293 F. 1013 (D.C. Cir. 1923).

20. See *Daubert*, 509 U.S. at 587.

21. The *Frye* test held sway in the federal courts until *Daubert* was rendered. See *id.* at 585, 589.

22. See *Frye*, 293 F. at 1013-14.

23. *Id.* at 1014.

24. See Adina Schwartz, *A "Dogma of Empiricism" Revisted: Daubert v. Merrell Dow Pharmaceuticals, Inc. and the Need to Resurrect the Philosophical Insight of Frye v. United States*, 10 HARV. J.L. & TECH. 149, 196 (1997); Lawrence B. Ebert, Comment, *Frye after Daubert: The Role of Scientists in Admissibility Issues as Seen through Analysis of the DNA Profiling Cases*, 1993 U. CHI. L. SCH. ROUNDTABLE 219, 245-46, 253 (1993).

The scholarly debates over *Frye* have been extensive.²⁵ One of the biggest criticisms coming from the anti-*Frye* wing is that the test leaves no room for the admissibility of new and brilliant science that is so ahead of its time, there is no “general acceptance” to be had in the relevant scientific field.²⁶ For example, under the *Frye* test, would the likes of a Galileo be permitted to testify? Galileo, it will be recalled, was condemned by the Catholic Church for defending Copernicus’ theory that the planets revolve around the sun instead of vice-versa.²⁷ If Galileo had attempted to give his expert opinion on this matter in a seventeenth-century court of law bound by the *Frye* test, he would never have testified. That would not be a sound result then and certainly not now in an era of ever expanding reliance on science-based technological achievement.

However, when, after seventy years, the *Daubert* Court tossed *Frye*, it ostensibly did not do so over concern about the potential Galileo phenomenon. Rather, the Court repudiated the *Frye* standard because it is inconsistent with and superseded by the FRE and especially FRE 702.²⁸ FRE 702, prior to *Daubert* and its progeny and minus the most recent ensuing amendments to the rules, provided: “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.”²⁹ The opinion for the Court in *Daubert* notes that there is nothing in the text or history of FRE 702 that indicates inclusion of *Frye*’s “general

25. See, e.g., Bert Black et al., *Science and the Law in the Wake of Daubert: A New Search for Scientific Knowledge*, 72 TEX. L. REV. 715, 722-27, 739-40 (1994) (referring to the *Frye* debate and detailing the pros and cons of the *Frye* test); Cassandra C. Colchagoff, *A New Era for Science and the Law: The Face of Scientific Evidence in the Federal Courts After Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 29 TULSA L.J. 735, 740-42 (1994) (surveying the arguments for and against *Frye*); Alma Kelley McLeod, Note, *Is Frye Dying or Is Daubert Doomed?: Determining the Standard of Admissibility of Scientific Evidence in Alabama Courts*, 51 ALA. L. REV. 883, 886-89 (2000) (reviewing criticisms and defenses of *Frye*); Schwartz, *supra* note 24, at 193-205 (taking a position in favor of a revamped *Frye* standard); Alan W. Tamarelli, Jr., *Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability—The Questionable Wisdom of Abandoning the Peer Review Standard for Admitting Expert Testimony*, 47 VAND. L. REV. 1175, 1196-98 (1994) (attacking *Frye*); Ebert, *supra* note 24, at 232-53 (defending *Frye*); Troy M. Horton, Comment, *The Debate Is Over: Frye Lives No More*, 19 T. MARSHALL L. REV. 379, 383-88 (1994) (contending that *Frye* was misguided).

26. Some writers speak of a “cultural lag” caused by *Frye*’s conservatism, resulting in a discrepancy between novel sound science and the inadmissibility of expert opinion testimony based upon such science. See, e.g., Colchagoff, *supra* note 25, at 735-36.

27. See A. Mark Smith, *Galileo*, 8 THE WORLD BOOK ENCYCLOPEDIA 11, 11-12 (2001).

28. See *Daubert*, 509 U.S. at 587-90.

29. FED. R. EVID. 702.

acceptance” test.³⁰ Indeed, the thrust of the federal evidence rules favors relaxing traditional barriers to opinion testimony, by experts or others.³¹

But what to put in the *Frye* test’s place? *Daubert* finds the answer in the words of FRE 702. First, the Court reasoned, the rule’s reference to “scientific knowledge” gives rise to a requirement of “evidentiary reliability,” i.e., the experts’ inferences or assertions must be more than unsupported speculation and must be derived by means of scientific method.³² Second, the Court explained, the rule’s insistence that experts’ testimony must “assist the trier of fact to understand the evidence or to determine a fact in issue”³³ establishes a relevancy requirement, i.e., in order for such testimony to assist the trier of fact, it must be *scientifically* relevant to resolving an issue in the case.³⁴ The Blackmun opinion illustrates the latter concept with a memorable example: expert testimony concerning the phases of the moon – let us say, that the moon was full on May 6th – would assist the jury and be scientifically relevant in ascertaining whether the night was not impenetrably dark on May 6th, provided that visibility on that night is a fact in issue.³⁵ However, this testimony may not be scientifically relevant to ascertaining whether a person behaved like a madman on the night of May 6th even if his insanity was a fact in issue.³⁶ Why? Because the presence of a full moon has not been to date scientifically linked with human irrationality. In short, the relevancy requirement built into FRE 702 mandates “a valid scientific connection to the pertinent inquiry.”³⁷

But, returning to the reliability prong of FRE 702, the *Daubert* decision tried to dissect what is entailed in assuring that this requirement is properly fulfilled.³⁸ The Court elaborated that the reliability prong entails a preliminary assessment by the trial judge as to whether the reasoning or methodology underlying an expert’s opinion testimony is scientifically valid.³⁹ The Court identified four factors that trial judges, as the so-called gatekeepers deciding whether to let in scientific expert testimony, might want to use in assessing reliability:

30. See *Daubert*, 509 U.S. at 588-89.

31. As the *Daubert* Court put it, *Frye* is “at odds with the ‘liberal thrust’ of the Federal Rules and their ‘general approach of relaxing the traditional barriers to ‘opinion’ testimony.’” *Id.* at 588 (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

32. See *id.* at 589-90.

33. *Id.* at 591 (quoting FED. R. EVID. 702).

34. See *id.* at 591-92.

35. See *id.* at 591.

36. See *Daubert*, 509 U.S. at 591.

37. *Id.* at 591-92.

38. See *id.* at 589-94.

39. See *id.* at 592-93.

1. Whether a theory or technique can be and has been tested;⁴⁰
2. “[W]hether [a] theory or technique has been subjected to peer review and publication;”⁴¹
3. “[T]he known or potential rate of error [for use of a particular scientific technique] and the existence and maintenance of standards controlling the technique’s operation;”⁴² and/or
4. Identification of a relevant scientific community and a determination as to the particular degree of acceptance of a theory or technique within that community.⁴³

Notice that the fourth factor essentially mimics the *Frye* test. So, what is going on here? Was the Supreme Court playing a not very subtle game with us – rejecting *Frye* in terms, but retaining it in substance? *Daubert* was not a game of judicial peekaboo. That is because the fourth factor – the *Frye* factor – is not mandatory and is only one of multiple factors that may be taken into account.⁴⁴ The Court in *Daubert* expressly cautioned the bar that the four factors were not meant to be a “definitive checklist”;⁴⁵ judges are free to use any combination of them, any one of them alone, none of them at all, or even as of yet unidentified factors, so long as the factors chosen further making the reliability determination.⁴⁶

The other case in the U.S. Supreme Court’s trilogy that concerns us here is *Kumho Tire Co. v. Carmichael*.⁴⁷ In the process of addressing the admissibility of a tire failure analyst’s expert testimony to the effect that a tire on the Carmichael’s minivan failed due to a manufacturing or design defect,⁴⁸ *Kumho* notably answered two questions left open by *Daubert*. To what other kinds of evidence, besides scientific expert testimony, do the reliability/scientific relevancy requirements apply,⁴⁹ and, if the requirements

40. *See id.* at 593.

41. *Id.* at 593.

42. *Daubert*, 509 U.S. at 594 (citations omitted).

43. *See id.* at 594.

44. *See id.* at 592-95. That the fourth factor is not mandatory is the obvious inference of the *Daubert* Court’s observation that the factors mentioned in its opinion do not constitute a “definitive checklist.” *See id.* at 593.

45. *See id.* at 593.

46. *See id.* at 593-95 (stating that “[m]any factors will bear on the [reliability] inquiry,” that the Court was not presuming to set forth a “definitive checklist,” and that “[t]he inquiry envisioned by Rule 702 is . . . a flexible one.”).

47. 526 U.S. 137 (1999).

48. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 143-45 (1999).

49. *See Kumho*, 526 U.S. at 141, 147.

do apply to other expert evidence, what factors should a trial judge employ in determining the reliability of non-scientific expert evidence?⁵⁰

The Supreme Court held in *Kumho* that the reliability and scientific relevancy requirements under FRE 702 do indeed apply to *all* expert testimony – and not just to expert testimony grounded on scientific knowledge.⁵¹ Thus, on the reliability front, where non-scientific expert testimony's factual foundation, data, principles, methods, or their application are called sufficiently into question, the trial judge must determine whether the testimony has a reliable basis in the knowledge and experience of the pertinent discipline.⁵² Moreover, the Court held that in gauging reliability, a trial judge may consider any factor(s) that would help determine a particular expert testimony's reliability.⁵³ Trial judges may use any of the *Daubert* factors or ignore them entirely and use other, as of yet unspecified factors – as long as a selected factor or factors is reasonably relevant to establishing reliability.⁵⁴ For instance, see the subsequent case of *First Tennessee Bank National Ass'n v. Barreto*,⁵⁵ in which the Court of Appeals for the Sixth Circuit ruled that none of the *Daubert* reliability factors were applicable to the non-scientific expert witness' testimony in issue, but found another, non-*Daubert* factor pertinent to establishing the reliability required by FRE 702.⁵⁶ In order to be pertinent for this purpose, *Kumho* provides that trial judges should consider the nature of the issue presented in a case, the expert's particular expertise, and the subject of his or her testimony.⁵⁷ Otherwise, federal law accords a district court broad latitude in deciding how to judge reliability.⁵⁸

These, in a nutshell, are the current principles binding the lower federal courts when faced with deciding the admissibility of expert witness testimony under FRE 702. Of course, they are not the only principles dealing with admissibility of expert witness evidence; other federal rules of evidence, as applicable, should enter into the calculus as well. But, *Daubert* and *Kumho*, taken together, represent the standards that, at a minimum, must come into play for the federal judicial system whenever a challenge is made under FRE 702 to proffered expert testimony on the theory that the testimony is not

50. See *id.* at 141-42.

51. See *id.* at 141.

52. See *id.* at 149.

53. See *id.* at 150-53.

54. See *id.* at 141-42, 150-53.

55. 268 F.3d 319 (6th Cir. 2001).

56. See *First Tenn. Bank Nat'l Ass'n v. Barreto*, 268 F.3d 319, 333-35 (6th Cir. 2001).

57. See *Kumho*, 526 U.S. at 150.

58. See *id.* at 142, 152-53.

“scientific, technical, or other specialized knowledge” and that such testimony will not “assist the trier of fact to understand the evidence or to determine a fact in issue.”⁵⁹

Indeed, FRE 702 was amended on December 1, 2000, expressly to incorporate the *Daubert-Kumho* principles so as to liberalize admissibility standards for expert opinion testimony. The amended rule now reads as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.⁶⁰

It should be highlighted that the amendment necessitates trial court scrutiny not only of the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. Furthermore, amended FRE 702 does not codify any of the factors that may be consulted by trial judges in making reliability determinations. As *Kumho* instructed, the new federal rule leaves the identification and utilization of reliability factors in the broad discretion of trial courts.

So, in the federal system, what are some of the other reliability factors, besides the “*Daubert* four,” that trial judges have been using? A smattering of examples attests to the fact that trial judges have not been wanting in creativity in rising to the challenges initiated by *Daubert*:

1. Some trial courts have considered whether an expert is proposing to testify about matters growing naturally and directly out of research the expert has conducted independent of the litigation, or whether he or she has developed opinions expressly for purposes of testifying. The former circumstance militates in favor of admissibility while the latter does not.⁶¹
2. Some trial courts have focused on whether an expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.

59. FED. R. EVID. 702.

60. *Id.*

61. *See, e.g., Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995). On remand from the United States Supreme Court, the Court of Appeals for the Ninth Circuit found inadmissible plaintiffs’ experts’ testimony that Bendectin caused shortening of limbs; the court was so persuaded because, among other things, the experts’ underlying research was conducted solely for purposes of the Bendectin litigation. *See Daubert*, 43 F.3d at 1317.

If an expert has done so, a court will be inclined to deny admissibility.⁶²

3. Some trial judges have found a key factor to be whether experts, in arriving at their opinions, have been as careful as they would be in the course of their professional work outside of their role as paid litigation consultants. If the experts have not been careful to this degree, these judges will exclude the experts' testimony.⁶³
4. There are trial courts that are especially influenced by whether the area of expertise of an expert typically yields reliable results for the type of opinion the expert is called upon to give. If the area of expertise does not generally produce such results, the courts will exclude the proffered opinion testimony.⁶⁴
5. Trial courts will also usually exclude expert opinion testimony that is based only on the expert's own experience with patients or on a few case studies.⁶⁵
6. Finally, some trial judges are swayed by whether an expert has sufficiently accounted for obvious alternative explanations for a phenomenon, and, if he or she has not provided such an accounting, the judges will exclude the expert's opinion testimony about the phenomenon.⁶⁶

A point of interest with respect to the last factor mentioned above is that the Court of Appeals for the Sixth Circuit has sensibly modified it so that to be admissible on the matter of causation, the expert witness' opinion testimony need not always eliminate every other conceivable cause of injury. In *Nemir v. Mitsubishi Motor Sales of America, Inc.*,⁶⁷ an automobile accident case, the court ruled that Thomas Horton, plaintiff's expert witness and an engineer with extensive training in seatbelt design, could testify that plaintiff's

62. See, e.g., *Lust v. Merrell Dow Pharm., Inc.*, 89 F.3d 594 (9th Cir. 1996). In this case, the expert's testimony was rejected because he extrapolated, without any scientific basis, from the accepted premise that Clomid causes certain birth defects to the conclusion that it must also have caused plaintiff's hemifacial microsomia. See *Lust*, 89 F.3d at 597-98.

63. See, e.g., *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 942 (7th Cir. 1997).

64. See, e.g., *Moore v. Ashland Chem., Inc.*, 151 F.3d 269, 277-79 (5th Cir. 1998) (en banc).

65. See, e.g., *Cavallo v. Star Enter.*, 892 F. Supp. 756, 765, 765 n.18, 767, 767 n.23 (E.D. Va. 1995), *aff'd in part*, 100 F.3d 1150 (4th Cir. 1996).

66. See, for example, *Claar v. Burlington N. R.R. Co.*, 29 F.3d 499, 502 (9th Cir. 1994), approving of the lower court's exclusion of plaintiffs' experts' testimony that plaintiffs' injuries were due to exposure to toxic chemicals, where the experts had not investigated any other possible causes of those injuries.

67. 6 Fed. App. 266 (6th Cir. 2001) (per curiam).

seatbelt became unlatched due to a design defect even though other possibilities existed with respect to causation.⁶⁸ The appellate court explained that the fact that several alternative causes for the latch's failure might have remained uneliminated only went to the accuracy of Horton's conclusion, not to the reliability of his underlying methodology and, hence, not to admissibility.⁶⁹ The appellate judges observed that the lower court had erred in requiring that Horton have knowledge of an exact cause of the failure in order to testify on causation.⁷⁰ This modification thus makes it possible for experts to testify on causation without their proponents bearing the exorbitant expense that might well be involved in discounting every conceivable other causal theory.

A related principle was expounded by the same court of appeals in *Greenwell v. Boatwright*,⁷¹ litigation also arising from a vehicular crash. At trial, defendant had introduced the testimony of accident reconstructionist expert, Kenneth Razak, on the issue of causation.⁷² In arriving at his conclusion, Razak relied solely on physical evidence obtained from the accident and chose to ignore eyewitnesses' testimony inasmuch as that testimony was contradictory and as he claimed that he had no principled reason for preferring one eyewitness version of events over another.⁷³ The appeals court held that expert testimony opining as to the cause of the accident was not inadmissible simply because it contradicted some eyewitness testimony, in the same case, offering a different cause.⁷⁴ The court cautioned, however, that Razak's opinion testimony would have been inadmissible if the facts upon which the expert founded his testimony contradicted the other evidence adduced at trial.⁷⁵

The above exposition describes the law on expert opinion testimony governing the *federal* court system. Although these legal developments are not without problems, the federal body of law appears reasonably coherent, consistent, and logical. Unfortunately, not as much can be said for Michigan where cat-in-the-hat-type mischief has definitely been afoot in relation to that state's laws on expert testimony. There has evolved a series of state legislated rules and state judicial interpretations of rules that, considered as a whole, do

68. See *Nemir v. Mitsubishi Motor Sales of Am., Inc.*, 6 Fed. App. 266, 275 (6th Cir. 2001) (per curiam).

69. See *Nemir*, 6 Fed. App. at 275.

70. See *id.* at 275, 275 n.8.

71. 184 F.3d 492 (6th Cir. 1999).

72. See *Greenwell v. Boatwright*, 184 F.3d 492, 494-95 (6th Cir. 1999).

73. See *Greenwell*, 184 F.3d at 496-98.

74. See *id.* at 497-98.

75. See *id.*

not hang together or make much sense and that threaten to sink the Michigan bar in an evidentiary morass reminiscent of the Seussian feline's slick tricks.

It all began about fifty years ago when Michigan adopted the *Frye* test in *People v. Davis*.⁷⁶ Thus, in Michigan state courts, the *Frye* test became known as the *Davis/Frye* test, a standard that has persisted, generally speaking, even after the adoption of the Michigan Rules of Evidence (MRE). In fact, the *Davis/Frye* test does seem perfectly attuned to the language of MRE 702 which provides:

If the court determines that recognized 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.⁷⁷

It should be immediately apparent that, unlike FRE 702, MRE 702 applies only to “*recognized* scientific, technical, or other specialized knowledge.”⁷⁸ In effect, it was the absence of the word “*recognized*,” or a word or phrase synonymous with it, that led the U.S. Supreme Court to decide in *Daubert* that unamended FRE 702 was incompatible with and superseded the federal *Frye* test.⁷⁹ Although FRE 702 has since been amended to bring it into line with *Daubert* and *Kumho*,⁸⁰ MRE 702 has not been changed since the trilogy was handed down. This means that new FRE 702 and MRE 702 potentially have drawn somewhat closer in meaning: the revised federal rule's insistence on the *reliability* of underlying principles and methods and their application parallels (more so than the federal rule without such a requirement) the Michigan rule's continued insistence that the expert's *recognized* scientific knowledge undergird his or her opinion. Whether the difference between “*reliable*” and “*recognized*” should sustain a difference in the evolving case law as between the federal courts and the Michigan state courts, the former continue to operate full-throttle under *Daubert-Kumho* while the latter continue, theoretically, to adhere to *Davis/Frye*.⁸¹

I use the term “*theoretically*” quite intentionally. In spite of the Michigan state judiciary's lip service to the primacy of *Davis/Frye*,⁸² things

76. 343 Mich. 348, 72 N.W.2d 269 (1955).

77. MICH. R. EVID. 702.

78. *Id.* (emphasis added).

79. *See supra* notes 28-31 and accompanying text.

80. *See supra* note 53 and accompanying text.

81. *See supra* notes 14-53 and accompanying text.

82. *See infra* notes 89-95 and accompanying text. “[T]he *Davis/Frye* test will remain the standard in Michigan unless the Michigan Supreme Court explicitly rejects it.” MICHAEL D. WADE & HON. DENNIS C. KOLENDA, MICHIGAN COURTROOM EVIDENCE 7-21 (The Institute of Continuing Legal Education 3rd ed. Supp. 2002).

are, in actuality, more complicated and awfully peculiar in an unmanageable pinkish-spot-sort-of-way. Recently, the Michigan Court of Appeals has appeared to be applying *Davis/Frye in tandem* with *Daubert* – as if the two formulations were not inherently contradictory. For instance, in *Dempsey v. Pease*,⁸³ a medical malpractice suit, the appeals court expressly remarked that, under MRE 702, it was applying “*Daubert*, and *Frye* to the instant case.”⁸⁴ The appeals court pulled an equally perplexing stunt in *Spect Imaging, Inc. v. Allstate Insurance Co.*,⁸⁵ by instructing the trial court on remand to use, under MRE 702, *Davis/Frye in tandem* with a reliability requirement borrowed not from *Daubert*, but, rather, from another Michigan court of appeals case⁸⁶ that references *Daubert* without fully adhering to *Daubert’s* thinking. That is, in *Spect Imaging*, the appeals court adopted a reliability requirement with respect to the expert’s underlying data;⁸⁷ but, unlike *Daubert*, the *Spect Imaging* court found that the requirement emanates out of MRE 702’s unique language (the testimony must derive from “recognized [medical] [or other scientific] knowledge”)⁸⁸ and found that the expert’s “inferences or assertions must be supported by appropriate objective and independent validation based on what is known, e.g., scientific and medical literature”⁸⁹ – the latter condition unmistakably echoing the *Davis/Frye* “general acceptance” standard. And, according to *Spect Imaging*, this analog to *Davis/Frye* is a “must” that somehow is supposed to co-exist with *Daubert’s* more flexible criteria. The *Spect Imaging* approach is in sharp contrast to that upon which the court of appeals had relied five years earlier in *People v. McMillan*.⁹⁰ In *McMillan*, the court had exclusively looked to the *Davis/Frye* test while observing that *Davis/Frye* is “more rigorous” than *Daubert*,⁹¹ implying a certain inconsistency between the two standards.

83. No. 222894 & No. 225065, 2001 WL 1547896 (Mich. App. Dec. 4, 2001) (per curiam) (unpublished opinion).

84. *Dempsey v. Pease*, No. 222894 & No. 225065, 2001 WL 1547896, at *5 (Mich. App. Dec. 4, 2001) (per curiam) (unpublished opinion).

85. 246 Mich. App. 568, 633 N.W.2d 461 (2001).

86. See *Spect Imaging, Inc. v. Allstate Ins. Co.*, 246 Mich. App. 568, 633 N.W.2d 461 (2001). The referenced case is *Nelson v. Am. Sterilizer Co.*, 223 Mich. App. 485, 491-92, 566 N.W.2d 671, 673-74 (1997), in which the Michigan Court of Appeals adopted a reliability test for the expert’s underlying data as described in the text accompanying notes 40-43.

87. See *Spect Imaging, Inc.*, 246 Mich. App. at 575-76, 633 N.W.2d at 467-68.

88. *Id.* at 578-79, 633 N.W.2d at 467-68 (citations omitted) (first alteration in original).

89. *Id.* at 578-79, 633 N.W.2d at 467.

90. 213 Mich. App. 134, 539 N.W.2d 553 (1995).

91. See *People v. McMillan*, 213 Mich. App. 134, 137 n.2, 539 N.W.2d 553, 555 n.2 (1995).

From a logical standpoint, the court may have got it right in *McMillan*, not because *Davis/Frye* is necessarily a better test, but precisely because *Davis/Frye* is stricter than *Daubert* such that the two tests are basically irreconcilable. Consider: *Davis/Frye* requires that novel scientific expert testimony is inadmissible unless the pertinent scientific community has signified its general acceptance of the theory or technique underlying the testimony; yet, *Daubert* would leave the door open to possible admissibility of that same testimony, even if there were no such general acceptance, as long as other sufficient reliability factors were satisfied. In other words, if a litigant were to call Galileo as an expert witness in a seventeenth-century court governed by the MRE, as interpreted by the state appeals court, that befuddled court would simultaneously be compelled to allow him to and to forbid him from testifying that the planets circle the sun. Not good.

(Incidentally, thus far Michigan does not embrace *Kumho* either.⁹² So, under MRE 702, the *Davis/Frye* standard, or *Davis/Frye/Daubert*, only is triggered when *scientific* expert testimony is offered.)

Ah, but that is not all. The cat's fondness for playing games in Michigan seems to have been all too pronounced. In 1996, the Michigan legislature supplemented MRE 702 with MCLA section 600.2955.⁹³ This statutory addition, part of a larger state effort at tort reform, is applicable in tort actions.⁹⁴ Its subsection (2) embodies the *Davis/Frye* test when *novel* scientific expert testimony is offered, but with the caveat that "general acceptance" must be achieved "among impartial and disinterested experts in the field."⁹⁵ Its subsection (1) provides, however, that when conventional or "un-novel" scientific expert opinion testimony is offered, the expert's testimony must be reliable and assist the trier of fact, i.e., be relevant to the issues in the case.⁹⁶ Subsection (1) further provides that

[i]n making that determination, the court shall examine the [expert's] opinion and the basis for the opinion, which basis includes the facts, technique, methodology, and reasoning relied on by the expert, and shall consider *all* of the following factors:

- (a) Whether the opinion and its basis have been subjected to scientific testing and replication.

92. My research has revealed no cases in which the Michigan Court of Appeals or Supreme Court has adopted the *Kumho* doctrine.

93. See MICH. COMP. LAWS ANN. § 600.2955 (West 2000).

94. The statute applies "[i]n an action for the death of a person or for injury to a person or property." § 600.2955(1). See Hon. Daniel P. Ryan, *Expert Opinion Testimony and Scientific Evidence: Does M.C.L. § 600.2955 "Assist" the Trial Judge in Michigan Tort Cases?*, 75 U. DET. MERCY L. REV. 263, 265 (1998).

95. § 600.2955(2).

96. See § 600.2955(1).

- (b) Whether the opinion and its basis have been subjected to peer review publication.
- (c) The existence and maintenance of generally accepted standards governing the application and interpretation of a methodology or technique and whether the opinion and its basis are consistent with those standards.
- (d) The known or potential error rate of the opinion and its basis.
- (e) The degree to which the opinion and its basis are generally accepted within the relevant expert community. As used in this subdivision, "relevant expert community" means individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market.
- (f) Whether the basis for the opinion is reliable and whether experts in that field would rely on the same basis to reach the type of opinion being proffered.
- (g) Whether the opinion or methodology is relied upon by experts outside of the context of litigation.⁹⁷

Subsection (1) plainly and significantly departs from *Daubert* in a number of respects. Whereas *Daubert's* list of reliability factors is not mandatory or exhaustive,⁹⁸ section 600.2955(1)'s list is both mandatory and exhaustive.⁹⁹ Moreover, *Daubert's* multifactor reliability analysis applies both to *novel and "un-novel"* scientific expert testimony¹⁰⁰ while section 600.2955(1) applies instead only to conventional scientific expert testimony.¹⁰¹

97. *Id.* (emphasis added).

98. See *supra* note 44 and accompanying text.

99. That section 600.2955(1)'s list of factors is mandatory is indicated by the statute's direction that "all" enumerated factors "shall" be considered by the trial court. See § 600.2955(1); see also Ryan, *supra* note 94, at 269.

100. See *Daubert*, 509 U.S. at 589; see also *id.* at 592 nn. 8 & 11.

101. See section 600.2955(2), which governs when only "[a] *novel* methodology or form of scientific evidence may be admitted into evidence." § 600.2955(2) (emphasis added). In contrast, section 600.2955(1) governs scientific evidence without the adjective "novel" or any of its synonyms. See WADE & KOLENDA, *supra* note 82, at 7-19 to 7-20.

It should be noted, however, that scientific evidence which, at the beginning of analysis under section 600.2955, was novel may yet end up facing the obstacles of both subsections (1) and (2). As one commentator has explained,

[t]o be admissible under Section 2955(2), novel scientific evidence must be generally accepted, as before. However, once the proponent proves that the "novel methodology or form of scientific evidence . . . has achieved general scientific acceptance," the evidence will no longer be novel, by definition. That formerly novel technique or "form of scientific evidence" must now be reanalyzed, along with other non-novel evidence, as part of the basis for the opinion.

Mary Elizabeth Lowe, *Scientific Testimony in Michigan: Testing the Experts*, 13 T.M. COOLEY L. REV. 207, 240-41 (1996) (citations omitted).

Some of the reliability factors set forth in section 600.2955(1) also differ substantially in their nature from those described in *Daubert* so as to make the state hurdle for admissibility much tougher to get by. On the one hand, *Daubert* states that a reliability factor may be whether the expert's underlying theory or technique has been subject to peer review and publication and notes that publication is but one element of peer review.¹⁰² According to *Daubert*, publication is not always "a *sine qua non* of admissibility."¹⁰³ The Michigan statute, on the other hand, specifically requires "peer review publication."¹⁰⁴ Another example of the differences is apparent in a comparison of *Daubert*'s "general acceptance" factor with that of section 600.2955(1)(e). It will be recalled that *Daubert* takes the position that one reliability factor *may* be whether there is "general acceptance" of the expert's *underlying* theory or technique in the relevant scientific community.¹⁰⁵ However, section 600.2955(1)(e) makes the "general acceptance" test mandatory and requires its application *both* to the basis of the expert's opinion and to the opinion itself.¹⁰⁶ Section 600.2955(1)(e) also defines "relevant expert community" to mean "individuals who are knowledgeable in the field of study and are gainfully employed applying that knowledge on the free market,"¹⁰⁷ thereby arguably eliminating many highly qualified experts hailing from government and academia;¹⁰⁸ this limitation is not present under *Daubert*. And there is more.

Section 600.2955(1) treats as mandatory two reliability criteria that are not even mentioned in *Daubert*. That is, section 600.2955(1)(f) directs the trial judge to assess whether experts in the field would rely on the same basis to reach the type of expert opinion being proffered;¹⁰⁹ and, section 600.2955(1)(g) requires the trial judge to assess whether the expert's opinion or underlying methodology is relied upon by experts outside of the

102. See *Daubert*, 509 U.S. at 593-94.

103. *Id.* at 593.

104. § 600.2955(1)(b).

105. The *Daubert* Court stated:

The inquiry envisioned by Rule 702 is, we emphasize, a flexible one. Its overarching subject is the scientific validity—and thus the evidentiary relevance and reliability—of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.

Daubert, 509 U.S. at 594-95 (citation omitted).

106. The Michigan statute lists as a reliability factor, "[t]he degree to which the opinion and its basis are generally accepted within the relevant expert community." § 600.2955(1)(e).

107. *Id.*

108. See Ryan, *supra* note 94, at 271.

109. See § 600.2955(1)(f).

litigation context.¹¹⁰ Finally, as mentioned previously, section 600.2955(1) applies solely to conventional scientific expert testimony and section 600.2955(2) applies solely to novel scientific testimony while *Daubert's* principles, through *Kumho*, apply to all expert testimony.¹¹¹

Some commentators have contended that section 600.2955 represents the Michigan legislature's attempt to effectuate a compromise by codifying both *Daubert* and *Frye* as one statutory provision.¹¹² An attempt it may be. But it is not a very successful one if compromise means integrating *Daubert*, intact, into Michigan state law. The reason that *Daubert* gets shortchanged in section 600.2955 is twofold. First, insofar as subsection (1) of section 600.2955 is concerned, its inclusion of the "general acceptance" test as a mandatory reliability factor undercuts any seeming flexibility flowing from the subsection's enumeration of other less stringent reliability factors as well;¹¹³ this is because the "general acceptance" test, as the most demanding factor, ends up being the real *sine qua non* for admissibility. Thus, *Davis/Frye* dominates subsection (1) despite appearances otherwise. Second, the very wording of subsection (2) leaves no doubt that *Davis/Frye* also dominates it.¹¹⁴

Section 600.2955 became effective about six years ago. Yet, there still is precious little case law applying the statute. And, the few decisions that do exist on the topic are singularly unedifying. Take, for instance, *McBride v. Chrysler Corp.*,¹¹⁵ a products liability suit in which plaintiff called as an expert witness Georg Muller, a mechanical engineer with extensive training and experience in auto accident reconstruction and the operation of motor vehicle components.¹¹⁶ The trial court prevented Muller from testifying on the ground that his area of expertise was not relevant to establishing the defect in controversy.¹¹⁷ The appeals court subsequently identified as one of the remaining issues on appeal whether section 600.2955 was applicable to the case so as to preclude Muller's testimony – an issue on which the trial court

110. See § 600.2955(1)(g).

111. See *supra* note 101 and accompanying text.

112. See JAMES K. ROBINSON & RONALD S. LONGHOFER, COURTROOM HANDBOOK ON MICHIGAN EVIDENCE 397-98 (West 2002).

113. See *id.* at 399; Lowe, *supra* note 101, at 238.

114. See Ryan, *supra* note 94, at 273.

115. No. 223891, 2002 WL 99704 (Mich. App. Jan. 22, 2002) (per curiam) (unpublished opinion).

116. See *McBride v. Chrysler Corp.*, No. 223891, 2002 WL 99704, at *1, *1 n.2 (Mich. App. Jan. 22, 2002) (per curiam) (unpublished opinion).

117. See *McBride*, 2002 WL 99704, at *1-*2.

had not ruled.¹¹⁸ For a variety of reasons, none of them interesting for purposes of this article, the appeals court declined to reach that issue.¹¹⁹

Or, there is *Daraban v. State*,¹²⁰ a negligence case brought for the wrongful death of plaintiff's decedent who died when his car went off the Mackinac Bridge.¹²¹ On appeal, plaintiff argued that the trial court had erroneously admitted the "psychological autopsy" of defendant's expert witness, Dr. Cheryl King, to prove that decedent's death was a suicide.¹²² The trial court had, it turns out, admitted the testimony without addressing the mandatory standards of section 600.2955.¹²³ The appellate court found that omission to be error, but not reversible error inasmuch as ample other evidence had been introduced to support a finding of suicide.¹²⁴

A third and generally unilluminating case is *Greathouse v. Rhodes*,¹²⁵ a medical malpractice action in which plaintiff wished to present standard of care experts at trial and to question them, in front of the jury, with learned treatises on the diagnosis and treatment of unstable angina.¹²⁶ Plaintiff's alleged purpose in offering the treatises was, she said, to establish under section 600.2955(1) that her experts' opinions (on the standard of care and defendants' failure to comply with that standard) were based on accepted scientific standards and otherwise met the requirements of section 600.2955(1).¹²⁷ The court of appeals framed the issue as whether section 600.2955(1) provides a basis for the admission of evidence that, but for that provision, would be inadmissible – here, the learned treatises.¹²⁸ The court of appeals reasoned that section 600.2955(1) is not a rule of evidence, does not displace the MRE, and does not allow a party to establish her expert witnesses' reliability through criteria that section 600.2955(1) directs only the trial judge to employ.¹²⁹ Therefore, the appeals court held that a party may not

118. See *id.* at *3.

119. See *id.*

120. No. 223659, 2002 WL 345545 (Mich. App. Mar. 5, 2002) (per curiam) (unpublished opinion).

121. See *Daraban v. State*, No. 223659, 2002 WL 345545, at *1 (Mich. App. Mar. 5, 2002) (per curiam) (unpublished opinion).

122. See *Daraban*, 2002 WL 345545, at *1.

123. See *id.*

124. See *id.*

125. 242 Mich. App. 221, 618 N.W.2d 106 (2000), *rev'd in part on other grounds*, ___ Mich. ___, 636 N.W.2d 138 (2001).

126. *Greathouse v. Rhodes*, 242 Mich. App. 221, 618 N.W.2d 106 (2000), *rev'd in part on other grounds*, ___ Mich. ___, 636 N.W.2d 138 (2001).

127. See *Greathouse*, 242 Mich. App. at 226-27, 618 N.W.2d at 109.

128. See *id.* at 236-40, 618 N.W.2d at 114-15.

129. See *id.* at 238-40, 618 N.W.2d at 115.

use section 600.2955(1) as authority to admit treatise evidence at trial;¹³⁰ rather, a party's attempt to show the reliability of her experts before the jury must be accomplished through and in a manner consistent with the MRE.¹³¹ At bottom, the court seems to have been concerned that plaintiff was not really trying to place evidence of reliability before the trial court, but was seeking to pull a fast one by misusing section 600.2955 as a vehicle to *bolster* her experts' testimony with corroborative medical evidence.¹³² *Greathouse*, then, aside from this one narrow point involving the use of learned treatises, sheds little light on the proper workings of section 600.2955.

CONCLUSION

As *The Cat in the Hat Comes Back* draws to a close, the cat (and his 26 little helper cats) are stumped by the ever expanding pink spot.¹³³ Stumped, that is, until the big cat summons little cat Z to use a secret weapon: Voom.¹³⁴ All that we are told about Voom is:

“Voom is so hard to get,
You never saw anything
Like it, I bet.
Why, Voom cleans up anything
Clean as can be!”¹³⁵

“Voom” sounds an awful lot like clear thinking – hard to come by and an effective antidote for many a muddle. In any event, Voom, whatever it is, does the trick. The pink blob disappears, and the main cat-in-charge then can triumphantly declare:

“So you see!” laughed the Cat,
“Now your snow is all white!
Now your work is all done!
Now your house is all right!”¹³⁶

130. *See id.*

131. *See id.*

132. *See id.* at n.8.

133. *See* DR. SEUSS, *supra* note 1, at 30-54.

134. *See id.* at 54-57.

135. *Id.* at 57.

136. *Id.* at 61.

As things stand, Michigan's rules on the admissibility of scientific expert opinion testimony are exasperatingly confusing and inconsistent. If only Voom were clear thinking, manifested as sage legislative reform and prompt curative intervention by the Michigan Supreme Court; if only we could,

Recruit wee cat Z, Voom in paws,
The pinkish Seussian snafu
In Michigan's evidence laws
To clean up and correctly redo!¹³⁷

137. Okay, so it's not Dr. Seuss.

