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Schwartz: Kumho Tire Co. v. Carmichael: The Supreme Court Follows Up On the
**KUMHO TIRE CO. V. CARMICHAEL: THE SUPREME
COURT FOLLOWS UP ON THE DAUBERT TEST**

*Martin A. Schwartz**

Hon. Leon D. Lazer:

In order to maintain the flow of the earlier section 1983 discussion, Professor Schwartz and I decided that we would break his presentation into two parts the gatekeeper role of the trial judge as to the introduction of scientific evidence. Professor Schwartz will now speak about *Kumho Tire Co. v. Carmichael*.¹

Professor Schwartz:

Kumho Tire is a follow-up to the 1993 Supreme Court decision in *Daubert v. Merrel Dow Pharmaceuticals*.² *Daubert* has become a household name along with *Miranda* and *Brown and Roe*.³ *Daubert* has not one, but two entries in the most recent edition of the law dictionary. There is one for *Daubert* hearing⁴ and there is one for *Daubert* test.⁵

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¹ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

² *Daubert v. Merrel Dow Pharmaceuticals*, 509 U.S. 579 (1993).

³ Here the speaker refers to three famous cases: *Miranda v. Arizona*, 384 U.S. 436 (1966), *Brown v. Board of Ed. of Topeka, Kansas*, 349 U.S. 294 (1955), and *Roe v. Wade*, 402 U.S. 941 (1973).

⁴ *Black's Law Dictionary* 401 (7th ed. 1999). The definition for "Daubert hearing" states in part: "A hearing conducted by federal district courts, usu.

In *Daubert*, the Supreme Court held that the test for the admissibility of scientific expert testimony was whether the testimony is relevant and reliable.⁶ The Supreme Court held that the old *Frye* test, established in *Frye v. United States*,⁷ more than seventy years ago which tests whether the scientific evidence gained general acceptance in the scientific community, was no longer the governing test under the Federal Rules of Evidence.⁸

Under *Daubert*, the district court is the so-called gatekeeper to make sure that the scientific evidence is both relevant and reliable establishing several criteria for evaluating reliability.⁹ One was whether the particular scientific theory has been or is capable of being tested, so some call that “testability.”¹⁰ Second, is whether the scientific theory has been subject to peer review and publication.¹¹ Third, whether there is some known rate of error or

before trial, to determine whether proposed expert testimony meets the federal requirements for relevance and reliability, as clarified by the Supreme Court in *Daubert...*” *Id.*

⁵ Black’s Law Dictionary 401 (7th ed. 1999). The definition for “Daubert test” states in pertinent part: “A method that federal district courts use to determine whether expert testimony is admissible under Federal Rule of Evidence 702, which generally requires that expert testimony consist of scientific, technical, or other specialized knowledge that will assist the fact-finder in understanding the evidence or determining a fact in issue.” *Id.*

⁶ See generally *Daubert*, 509 U.S. 579 (1993). “Under the Rules the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.” *Id.* at 589.

⁷ *Frye v. United States*, 54 U.S. App. D.C. 46, 293 F. 1013, 54 App. D.C. 46 (1923); 34 A.L.R. 145 (1923).

⁸ *Daubert*, 509 U.S. at 589. The Court stated specifically: “Given the Rules’ permissive backdrop and their inclusion of a specific rule on expert testimony that does not mention “general acceptance,” the assertion that the Rules somehow assimilated *Frye* is unconvincing. *Frye* made “general acceptance” the exclusive test for admitting expert scientific testimony. That austere standard, absent from, and incompatible with, the Federal Rules of Evidence, should not be applied in federal trials.” *Id.*

⁹ *Id.* at 592-593. The Court stated that the trial judge must determine these factors at the outset and emphasized that the set of criteria was not a definitive checklist or test. *Id.*

¹⁰ *Id.* at 593. The Court explained: “Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified.” *Id.*

¹¹ *Id.* at 593. Publication is not absolutely necessary to establish that the technique has been subjected to peer review, but scrutiny by the scientific

standard for government use of this process.¹² Finally, it remains as a factor whether the scientific theory has gained general acceptance in the scientific community.¹³ If you think about that last factor, it is clear that the *Frye* test still remains relevant under the Federal Rules of Evidence, but just as a factor rather than as a governing test.¹⁴

Since the *Frye* test was around for seventy years it used to be the leading star of a show, but now it is like a fading actor or actress. It just has a subordinate role.

Some say that if you look at the way the decision is written, one of the purposes is to create a flexible framework for the trial judge in a Federal Court.¹⁵ However, it is also to keep so-called junk science away from the jury.¹⁶ And the way I heard one expert on the law of evidence talk about this, the *Daubert* framework means that to be admissible, scientific evidence has to not only ‘talk the talk’ but also has to ‘walk the walk.’ That is established by looking at factors like testability and publication and so forth.¹⁷

community increases the chances that flaws in the methodology will be detected.
Id.

¹² *Daubert*, 509 U.S. at 594.

¹³ *Id.* at 594. General acceptance remains a pertinent factor because a technique that is known to the relevant scientific community but only gains minimal support is suspect. *Id.* (citing *United States v. Downing*, 753 F.2d 1224, 1238 (1985)).

¹⁴ *Id.* The Court made clear that reliability assessment permits, although it does not require “explicit identification of relevant scientific community and an express determination of a particular degree of acceptance within that community.” *Id.*

¹⁵ See *Kumho*, 536 U.S. 137, 141-142. The *Kumho* Court in applying the *Daubert* framework explained:

“But as the Court stated in *Daubert* the test of reliability is “flexibility” 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.” *Id.* (citing *General Electric Co. v. Joiner*, 522 U.S. 136 (1997)).

¹⁶ *Daubert*, 509 U.S. at 596. The danger of junk science, in the view of the Court, was adequately safeguarded against by conventional devices such as vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof. *Id.*

¹⁷ *Id.* at 593.

Since *Daubert* was decided in 1993, it has given rise to a large number of difficult legal issues. There are now scientific law reporters, entire volumes and treatises on scientific evidence post-*Daubert*.¹⁸

One of the issues that arose was the scope of appellate review. In 1998, in *General Electric v. Joiner*, the United States Supreme Court held that when the trial judge rules to admit or to exclude the expert testimony, the standard of review on appeal is abuse of discretion.¹⁹ That is a deference to the judgment of the judge.

The other big issue discussed in *Kumho Tire*²⁰ was whether *Daubert* was intended to apply on the one hand only to scientific testimony, or whether it was intended to apply to all expert testimony.²¹ This became an issue because there is a footnote in the *Daubert* opinion that says that we are ruling only on the admissibility of scientific evidence.²² *Kumho Tire* involved an automobile accident case resulting from the blowout of a tire, which caused the vehicle to overturn.²³ One person was killed in

¹⁸ William W. Schwarzer, MANAGEMENT OF EXPERT EVIDENCE, Reference Manual on Scientific Evidence 7 (1994); Margaret A. Berger, EVIDENTIARY FRAMEWORK, Reference Manual on Scientific Evidence 37 (1994); Linda A. Bailey ET AL., REFERENCE GUIDE ON EPIDEMIOLOGY, Reference Manual on Scientific Evidence 121 (1994); Bernard D. Goldstein and Mary Sue Henifin, REFERENCE GUIDE ON TOXICOLOGY, Reference Manual on Scientific Evidence 181 (1994); Judith A. McKenna ET AL., REFERENCE GUIDE ON FORENSIC DNA EVIDENCE, Reference Manual on Scientific Evidence 273 (1994); David H. Kaye and David A. Freedman, REFERENCE GUIDE ON STATISTICS, Reference Manual on Scientific Evidence 331 (1994); Joe S. Cecil and Thomas E. Willging, COURT-APPOINTED EXPERTS, Reference Manual on Scientific Evidence 525 (1994); Margaret .G. Farrell, SPECIAL MASTERS, Reference Manual on Scientific Evidence 575 (1994).

¹⁹ *General Elec. Co. v. Joiner*, 522 U.S. 136, 143 (1997). The Court stated: "We hold that the Court of Appeals erred in its review of the exclusion of Joiner's experts' testimony. In applying an overly "stringent" review to that ruling, it failed to give the trial court the deference that is the hallmark of abuse of discretion review. *Id.*

²⁰ *Kumho*, 526 U.S. 137 (1999).

²¹ *Id.* at 147.

²² *See Daubert*, 509 U.S. at 590, n. 8, where the Court stated: "Rule 702 also applies to 'technical, or other specialized knowledge.' Our discussion is limited to the scientific context because that is the nature of the expertise offered here." *Id.* at 590.

²³ *Kumho*, 526 U.S. at 142.

the accident and a number of others were severely injured, and an action was brought against the manufacturer of the tire.²⁴

The plaintiffs had an expert, who styled himself as being an expert in tire failure analysis.²⁵ I do not know if he actually is a tireologist, but that is what he did, although he did not claim to be a scientist.²⁶ He said that through touching and by looking at the tire, he was capable of making an evaluation as to whether the tire failed as a result of a manufacturing or design defect.²⁷ “The expert based his opinion upon a visual aid and tactile inspection of the tire and upon the theory that in the absence of at least two of four specific, physical symptoms, indicating tire abuse, the failure of the sort that occurred here was caused by defect.”²⁸ By tire abuse, that did not mean people went around kicking the tire, the “expert” meant that usually the tire was underinflated.²⁹ The expert stated that he “was able to tell by looking at the tire and touching it, whether the blowout was the result of abuse of the tire or a manufacturing defect.”³⁰ As a result of that evaluation, he came to the conclusion that in this instance the tire blowout was the result either of a manufacturing defect or a design defect.³¹

In terms of the way the litigation unfolded, this expert opinion was absolutely critical for the plaintiffs’ case, because they sought to submit this opinion on a motion for summary judgment.³² The plaintiffs’ attorneys knew that if they could get this case to a jury, given what happened here one person killed and a number of people injured, they were going to have a very good chance of

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 156. According to the Court, the respondents argued that a method of tire failure analysis that employs a visual/ tactile inspection is a reliable method, based on use by other experts, and their own expert’s long experience working for Michelin.” *Id.*

²⁸ *Id.*

²⁹ *Kumho*, 526 U.S. at 144.

³⁰ *Id.*

³¹ *Id.* at 143.

³² *Id.* at 145. The opinion stated that “the District Court found all those factors argued against the reliability of Carlson’s [the expert’s] methods, and granted the motion to exclude the testimony (as well as the defendants’ accompanying motion for summary judgment.)” *Id.*

getting an excellent recovery. So the key issue here was the admissibility of this expert opinion.³³

The Supreme Court held that the *Daubert* framework, meaning the gatekeeper role of the district judge to make sure that expert testimony is both relevant and reliable, is not limited to scientific testimony.³⁴ Rather, it applies to all expert testimony that is sought to be introduced in the federal courts.³⁵ That obviously, in itself, is an important holding.

That had to be the law, otherwise it would mean that district court judges could admit expert testimony even if that expert testimony was never found to be reliable.

The idea that after *Daubert*, district courts would have authority to admit expert testimony that was not reliable, never made any sense. Although this is not earth shattering, it is an important holding, and an important point resolved by the Court.

The other issue presented in *Kumho Tire* concerned the four factors for assessing reliability that were identified in the opinion for *Daubert*.³⁶ The four factors were never meant to be an exclusive listing of factors for evaluating reliability, rather they were suggested factors that were likely to be important.³⁷ *Kumho Tire* is important because the Court said that these factors identified in *Daubert* may be applied by the trial judge in a flexible way³⁸ understanding that they may not all be applicable in every instance.³⁹

Many experts in Federal Court testify on the basis of expertise that comes from their experience.⁴⁰ For example, a plumber, under

³³ *Id.* at 149.

³⁴ *Id.* at 147. The Court stated: "In *Daubert*, the Court specified that it is the Rule's word 'knowledge,' not the words (like 'scientific') that modify that word, that 'establishes a standard of evidentiary reliability'... Hence as a matter of language, the Rule applies its reliability standard to all 'scientific,' 'technical,' or 'other specialized' matters within its scope." *Id.*

³⁵ *Kumho*, 526 U.S. at 148.

³⁶ *Daubert*, 509 U.S. at 593-595. The four factors are whether the theory or scientific technique has been tested, subjected to peer review, evaluated in terms of error rates and generally accepted in the relevant scientific community. *Id.*

³⁷ *Id.*

³⁸ *Kumho*, 526 U.S. at 150.

³⁹ *Id.*

⁴⁰ *Id.* at 149.

the Federal Rules of Evidence, could be qualified as an expert.⁴¹ Last night, I watched an old version of *The Honeymooners* with my daughter. As I was watching that, I was thinking about this presentation today, and thinking that Ralph Cramdon could be an expert witness in bus driving.

One of my favorite expert testimony cases, was the person who said, "I am an expert because I have smoked marijuana over a thousand times. I can tell you what marijuana looks like, I can tell you what it feels like."⁴² There is another expert who had been convicted of breaking and entering about seven or eight times.⁴³ The court said, "We are hard pressed to find somebody who has more expertise in the use of burglar tools."⁴⁴ This is the person who knows what a crowbar is used for, how a burglar uses flashlights, so forth and so on.⁴⁵

If you think about these people, the person who has expertise in marijuana, the plumber, or the burglar, and you think about the *Daubert* factors, they probably didn't publish in scholarly journals. That's not too likely. I guess there could be peer review, maybe, of someone who smoked marijuana ten thousand times. But in reality, there is not likely to be peer review.

Kumho Tire stresses the point that district judges would have a great deal of flexibility in this gatekeeper role in assessing reliability; it is not only the qualifications of the proposed expert, but also the methodology that the expert uses, and even the conclusion that the expert came to.⁴⁶ The idea here is that these factors were never meant to be applied by the federal trial judges in any type of rigid fashion.

⁴¹ Under FRE 702, special education or certification is not required; a person can qualify as an expert based on his or her "knowledge, skill, experience, training or education."

⁴² See *United States v. Johnson*, 575 F. 2d 1347, 1360 (1978). The opinion stated: "During voir dire, he [expert] admitted he had smoked marijuana over a thousand times and he had dealt in marijuana as many as twenty times. He also said that he had been asked to identify marijuana over a hundred times and had done so without making a mistake." *Id.*

⁴³ *State v. Briner*, 198 Neb. 766 (1977).

⁴⁴ *Id.* at 769.

⁴⁵ *Id.*

⁴⁶ *Kumho*, 526 U.S. at 157.

The district judge has the flexibility now. If you are a litigator, remember it is great discretion that the district judge has and so do your best not to aggravate the district judge.

Hon. Leon D. Lazer:

Do not forget that this is a federal rule and New York State still follows the *Frye* Rule.⁴⁷

⁴⁷ *People v. Wesley*, 83 N.Y.2d 417, 423 n. 2; 633 N.E.2d 451; 611 N.Y.S.2d 97 (1994). The Court of Appeals declined to apply the Daubert test, stating that the Supreme Court decision was only binding on the federal courts.