

IN THE SUPREME COURT OF THE STATE OF MINNESOTA

ADM10-8047

IN RE: PROPOSED AMENDMENTS TO THE  
MINNESOTA RULES OF EVIDENCE

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COMMENT OF MINNESOTANS FOR LAWSUIT REFORM AND  
AMERICAN TORT REFORM ASSOCIATION ON PROPOSED  
AMENDMENT TO RULE 702

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Minnesotans for Lawsuit Reform (MnFLR) and the American Tort Reform Association (ATRA) urge the Court to amend Minnesota Rule of Evidence 702 to adopt the language and approach of Federal Rule of Evidence 702. Both MnFLR and ATRA regard careful judicial review of the reliability of expert testimony as critical to a fair and well-functioning judicial system. The federal approach is the majority rule.

MnFLR is the state's leading business advocacy organization focused solely on Minnesota's civil justice system. MnFLR represents over 65,000 employers, including numerous statewide business trade associations, local chambers of commerce, and individual businesses. MnFLR has appeared before the Court as an *amicus curiae*.<sup>1</sup>

ATRA is a broad-based national coalition of businesses, corporations, municipalities, associations, and professional firms that likewise seeks fairness, balance, and predictability in civil litigation.

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<sup>1</sup> See *Graphic Commc'ns Local 1B Health & Welfare Fund "A" v. CVS Caremark Corp.*, 850 N.W.2d 682 (Minn. 2014).

## I. Adoption of *Daubert* Should Be the Court's Preferred Approach

Expert evidence can be both powerful and misleading. An expert witness, by definition, presents information that is beyond the common knowledge of the average person. Experts have special privileges, such as the ability to testify on matters beyond their firsthand knowledge or observation, to rely on hearsay or other inadmissible evidence, and to opine on the ultimate legal issue in the case, such as whether a product caused the plaintiff's injury. Given these powers and the potential consequences of unjustly imposing liability, judges have a special responsibility to act as gatekeepers to be sure only reliable expert testimony is admitted. This responsibility is accomplished by conducting a preliminary assessment of whether the proposed testimony is the product of reliable scientific method or is merely based on subjective beliefs or unsupported speculation.

That is the approach the U.S. Supreme Court adopted in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and its progeny, *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). *Daubert* “changed [the] deference-to-the-field approach . . . [and] brought [a] scientific culture to the courtroom.”<sup>2</sup> As Justice Breyer observed, “These techniques are neutral, in principle favoring neither plaintiffs nor defendants.”<sup>3</sup>

The Minnesota Supreme Court has instructed judges considering the admissibility of expert testimony to evaluate whether an expert's theory is “generally accepted” and scientifically reliable. *See State v. Mack*, 292 N.W.2d 764,

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<sup>2</sup> David L. Faigman *et al.*, *How Good is Good Enough?: Expert Evidence Under Daubert and Kumho*, 50 Case W. Res. L. Rev. 645, 655-56 (2000).

<sup>3</sup> Stephen G. Breyer, *The Interdependence of Science and Law*, 280 Sci. 537, 538 (1998).

768-72 (Minn. 1980). Unlike the federal courts and most state courts, however, Minnesota courts only apply this level of scrutiny to “novel” scientific evidence. *See Goeb v. Tharaldson*, 615 N.W.2d 800, 814 (Minn. 2000) (reaffirming adherence to *Frye-Mack* standard). Expert testimony that is grounded in something other than science or is not “novel” falls outside this approach and is broadly admissible in the discretion of the trial court.<sup>4</sup> All expert evidence should be based on reliable principles and methods.

If Minnesota Rule of Evidence 702 is amended to be fully consistent with the federal rule, a trial court judge’s gatekeeping role would extend to all expert testimony.<sup>5</sup> This established methodology assures that an expert in court employs the same level of intellectual rigor as would be expected in the relevant scientific community or applicable field. Meritorious cases will proceed to trial.

The approach in Federal Rule of Evidence 702 has gained broad acceptance. Two-thirds of the states utilize an approach that is consistent with the federal rule. In fact, since the Minnesota Supreme Court decided *Goeb*, at least 11 states have adopted and successfully transitioned to the federal standard, including New Hampshire in 2002;<sup>6</sup> Oklahoma in 2003;<sup>7</sup> Georgia in 2008;<sup>8</sup> Arizona in 2010;<sup>9</sup>

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<sup>4</sup> *See* Lorie S. Gildea, *Sifting the Dross: Expert Witness Testimony in Minnesota After The Daubert Trilogy*, 26 Wm. Mitchell L. Rev.93, 100 (2000).

<sup>5</sup> *See Kumho Tire Co.*, 526 U.S. at 154-55 (holding that the *Daubert* standard applies to all technical or other specialized testimony offered by experts).

<sup>6</sup> *See Baker Valley Lumber v. Ingersoll-Rand*, 813 A.2d 409 (N.H. 2002).

<sup>7</sup> *See Christian v. Gray*, 65 P.3d 591 (Okla. 2003) (extending application of *Daubert* from criminal matters to civil cases).

<sup>8</sup> *See Mason v. Home Depot U.S.A., Inc.*, 658 S.E.2d 603 (Ga. 2008); *see also* Ga. Code Ann. § 24-7-702 (codifying federal standard in 2005).

Alabama, North Carolina, and Wisconsin in 2011;<sup>10</sup> Florida in 2013;<sup>11</sup> Kansas in 2015;<sup>12</sup> the District of Columbia in 2016;<sup>13</sup> and Missouri in 2017.<sup>14</sup> California also took a significant step toward this approach in 2012.<sup>15</sup> As the District of Columbia’s high court found in adopting *Daubert* in 2016, “there are substantial benefits to be gained from adopting a test that is widely used.”<sup>16</sup>

Adoption of the Federal Rule of Evidence 702 standard would bring about greater consistency among courts and discourage forum shopping. This is a concern as Minnesota has increasingly become an outlier in its approach to evaluating the admissibility of expert testimony.<sup>17</sup>

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<sup>9</sup> See S.B. 1189 (Ariz. 2010) (codified at Ariz. Rev. Stat. § 12-2203); see also Ariz. R. Evid. § 702 (amended effective Jan. 1, 2012).

<sup>10</sup> See S.B. 187 (Ala. 2011) (amending Ala. Code § 12-21-160); H.B. 542, 2011 Sess. § 1.3 (N.C. 2011) (amending N.C. Gen. Stat. § 8C-702(a)); S.B. 1, 2011-12 Leg., Spec. Sess. (Wis. 2011) (amending Wis. Stat. §§ 907.02, 907.03); see also *State v. McGrady*, 787 S.E.2d 1, 5 (N.C. 2016) (confirming *Daubert* governs admission of expert testimony following adoption of language mirroring federal rule).

<sup>11</sup> See Fla. Laws ch. 2013-107 (amending Fla. Stat. Ann. §§ 90.702, 90.704); but see *In re Amendments to the Florida Evidence Code*, 210 So. 3d 1231 (2017) (declining to adopt amended expert evidence standard to the extent amendments were procedural).

<sup>12</sup> See Kan. Stat. Ann. § 60-456(b); see also *Smart v. BNSF Ry. Co.*, 369 P.3d 966, 971-72 (Kan. Ct. App. 2016) (recognizing adoption of *Daubert*).

<sup>13</sup> See *Motorola, Inc. v. Murray*, 147 A.3d 751 (D.C. 2016).

<sup>14</sup> See H.B. 153 (Mo. 2017) (repealing and replacing Mo. Rev. Stat. Ann. § 490.065).

<sup>15</sup> See *Sargon Enter., Inc., v. Univ. of S. Cal.*, 288 P.3d 1237 (Cal. 2012) (affirmatively recognizing trial courts have a “gatekeeper” function in admitting expert testimony).

<sup>16</sup> *Murray*, 147 A.3d at 757.

<sup>17</sup> For a discussion of concerns with Minnesota’s current expert evidence standard, see Zack Alter, Note, *Unpacking Frye-Mack: A Critical Analysis of Minnesota’s Frye-Mack Standard for Admitting Scientific Evidence*, 43 Mitchell Hamline L. Rev. 626 (2017).

## II. Advisory Committee Approach – An Improvement Over Status Quo

The Advisory Committee's recommended amendment to Minnesota Rule 702 represents an improvement over Minnesota's current practice. The Committee's recommendation to adopt part of the standard included in the Uniform Rules of Evidence promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL), which is a highly respected organization, includes several factors which promote the use of objectively reliable evidence based on reliable principles, theories or methods. Consequently, the approach is a more attractive alternative for this Court than doing nothing and rejecting the Advisory Committee's conclusion that the state's expert testimony standard requires amendment.

Respectfully submitted,

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