

THE NEW STANDARDS FOR QUALIFYING AS AN EXPERT IN COURT

By James W. Standard, Jr.

Mr. Standard is a graduate of Washington University in St. Louis and the Georgia State University College of Law, where he graduated *magna cum laude* and served as an editor on the Georgia State University Law Review. Mr. Standard's practice areas include contractual and business disputes and professional liability. Mr. Standard has tried and litigated cases involving contractual disputes, psychological malpractice, medical malpractice, environmental and toxic tort liability, and products liability throughout the country.

Mr. Standard is the co-author of the new treatise, *The Admissibility of Expert Testimony in Georgia*, which is scheduled for publication by Thompson/West in the Fall of 2005. This authoritative text will include analysis of the admissibility of expert testimony under Georgia law, including a chapter devoted exclusively to psychological testimony.

jstandard@gorbyreeves.com

404-239-1150

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I. Introduction.

Scholarly concerns over the routine admission of suspect “expert” testimony came to a head in the early 1990s, and were perhaps best exemplified with Peter Huber’s commentary that “the kind of expertise regularly accepted as admissible by courts was, frankly, ‘junk’ of scandalous lack of dependability.”¹ With the phrase “junk science” thus coined, the United States Supreme Court threw its hat into the ring in the seminal case of Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786 (1993), and has since changed the way federal courts analyze and admit expert testimony.

Several jurisdictions throughout the nation have adopted some version of Daubert or Rule 702 of the Federal Rules of Evidence, which in the year 2000 codified the underlying principles of Daubert.² This year, Georgia has followed this trend by enacting O.C.G.A. § 24-9-67.1, which adopts Rules 702 and 703 of the Federal Rules of Evidence, and expressly incorporates Daubert and its progeny as precedent in the construction of the new statute.

II. The Daubert trilogy.

By way of background, it is important to understand the holding of Daubert, as well as the two United States Supreme Court decisions following in its wake. Prior to Daubert, the typical manner by which scientific testimony was evaluated for admissibility was set forth in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), some seventy years

¹ Peter W. Huber, *Galileo’s Revenge: Junk Science in the Courtroom* (New York, Basic Books 1991).

² Rule 702 of the Federal Rules of Evidence governs the admissibility of expert testimony, providing that:
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

earlier. Under Frye, scientific testimony would be admissible only if the principles underlying the expert's conclusions had been "sufficiently established to have gained general acceptance in the particular field in which it belongs." Id. at 1014.

Rejecting this "general acceptance" test as overly-restrictive and inconsistent with the Federal Rules of Evidence, the Daubert Court focused its inquiry not on the expert's conclusions, but rather, on the methodology underlying the expert's conclusions. Id. at 595. In ruling that an expert's testimony must be based on "scientific knowledge" in order to be admissible, the Court explained:

The adjective "scientific" implies a grounding in the methods and procedures of science. Similarly, the word "knowledge" connotes more than subjective belief or unsupported speculation. . . . [I]n order to qualify as "scientific knowledge" an inference or assertion must be derived by the scientific method. Proposed testimony must be supported by appropriate validation - i.e. "good grounds," based on what is known.

Id. at 590. Daubert held that the principles and methods underlying an expert's opinions must be demonstrably reliable, and that the trial court has the responsibility to determine whether the expert's methodology is reliable before it can be heard by a jury. Id. at 593-595. The Court explained that this "gatekeeping" role exists because, when presented to a jury, "[e]xpert evidence can be both powerful and quite misleading because of the difficulty in evaluating it." Id. at 595.

Shortly thereafter, the Supreme Court reaffirmed its holding in Daubert in the decision of General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512 (1997), and held that trial courts should not defer to the opinions offered by an expert simply by virtue of the witness' proclaimed expertise and superior knowledge.

Trained experts commonly extrapolate from existing data. But nothing in either Daubert or the Federal Rules of Evidence requires a district court to

facts of the case.

admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. at 146. Additionally, the Court held that a trial court's exercise of its "gatekeeping" function in determining the reliability of an expert's testimony would be granted great deference, and would not be disturbed on appeal unless the trial court's determination was "manifestly erroneous." Id. at 141-142.

Following Daubert, there was some question as to whether the holding articulated was applicable only to expert testimony which was "scientific" in nature, or all expert testimony. Was Daubert applicable to testimony that was merely "technical" in nature, such as accident reconstruction, and was it applicable to the "soft" social sciences, such as psychology? In Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141, 119 S.Ct. 1167 (1999), the United States Supreme Court settled this debate by holding that the trial court's gatekeeping requirement exists not only for expert testimony that is deemed "scientific" in nature, but for *all* expert testimony, whether based upon "scientific," "technical," or "other specialized" knowledge. Id. at 141. Elaborating upon the objective of Daubert's "gatekeeping" requirement, Kumho Tire explained that it was simply to enable trial courts to employ the practical tools available to them to ensure that an expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." Id. at 152.

III. The New Georgia Statute.

A. Criminal cases.

Prior to 2005, Georgia's statute regarding the admissibility of expert testimony read simply: "The opinions of experts on any question of science, skill, trade, or like

questions shall *always* be admissible[.]” O.C.G.A. § 24-9-67 (emphasis supplied). In practice, it was a rare occasion that an expert’s testimony was excluded by a trial court.

Before addressing the new statute, it is important to point out that the liberal standard of O.C.G.A. § 24-9-67 has not been completely abrogated. This statute still exists, and it is now specifically applicable in *criminal* cases. Thus, Georgia’s law regarding the admissibility of expert testimony in criminal cases remains unchanged. It will be important for psychologists to bear in mind the divergent standards for admissibility in criminal and civil actions. For instance, a psychologist’s testimony regarding whether an alleged victim’s symptoms are consistent with a certain syndrome, or whether an alleged perpetrator’s behaviors are consistent with the profile of known perpetrators, may become relevant in both a criminal action for child or spousal abuse, as well as in a civil action for divorce or custody. However, as explained below, testimony which may be admissible in the criminal action may not be admissible in corresponding civil action.

B. Civil cases.

With respect to *civil* cases, the legislature has enacted O.C.G.A. § 24-9-67.1, which substantially deviates from the text of its progenitor, O.C.G.A. § 24-9-67. Below is a discussion of these changes.

1. Adoption of FRE 703 - The Bases Of An Expert’s Testimony Need Not Themselves Be Admissible.

Subsection (a) of this new statute provides:

The provisions of this Code section shall apply in all civil actions. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or

trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

This subsection tracks, in large measure, the language of Rule 703 of the Federal Rules of Evidence.

Essentially, this subsection provides that an expert's opinion can be based on evidence which is otherwise inadmissible (such as the "hearsay" report of another therapist who has not testified before the court) *provided* that the evidence is "of a type reasonably relied upon by experts" in the field when forming opinions. Should an expert be able to show the court that others in the field routinely rely upon such evidence when forming their own opinions, the fact that the particular document or report is not "in evidence" will not preclude an expert from offering an opinion which is based upon that document or report.

As a practical matter, this statutory provision does not significantly change Georgia law. Georgia case law has long held that experts can base their opinions on their own personal knowledge, or upon facts proven by other witnesses which are outside of their personal knowledge. See Leonard v. State, 269 Ga. 867 (1998); Johnson v. Knebel, 267 Ga. 853 (1997). Further, Georgia case law has recognized that an expert may base his testimony, at least in part, on inadmissible evidence such as hearsay, provided that such evidence is of a type reasonably relied upon by experts in the field. See Beeher v. State, 240 Ga. App. 457 (2000); but see Leonard v. State, 269 Ga. 867 (1998) (expert cannot serve as a mere "conduit" for the opinions of others, and an expert's opinion

which is premised *entirely* on hearsay is not admissible). The statute does, however, provide the new requirement that a trial court conduct a balancing test to determine whether the expert may disclose to the jury the inadmissible evidence that forms the basis of his or her opinion.

2. Adoption of FRE 702 and Daubert - The Expert's Testimony Must Be Relevant and Reliable.

Subsection (b) of Georgia's new statute provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action 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 which are or will be admitted into evidence at the hearing or trial;
- (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.

When compared to O.C.G.A. § 24-9-67, this statute constitutes a major change in the rules regarding the admissibility of expert testimony in civil cases. As can be seen by reference to footnote 2 above, this statutory provision essentially tracks Rule 702 of the Federal Rules of Evidence. As noted above, Rule 702 represents the codification of the principles enunciated in Daubert, and not wanting to mince words on the subject, the legislature, in enacting the statute, expressly incorporated Daubert and its progeny as a guiding influence in the construction of the new statute:

It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the United States Supreme Court in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); General Electric Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999); and

other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

O.C.G.A. § 24-9-67.1(f).

a. Relevance.

Broken down, the first requirement of this subsection is that the expert testimony, whether based on “scientific,” “technical,” or other “specialized knowledge,” must assist the jury in understanding the evidence or determining a fact at issue in the case. As explained by Daubert, “[t]his condition goes primarily to relevance. ‘Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful.’” As further elaborated upon by the Daubert court:

The study of the phases of the moon, for example, may provide valid scientific “knowledge” about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.

Id. at 591. Expert witnesses are not permitted to be mere “mouthpieces” for one party’s theory of the case, and where the expert testimony provides nothing beyond what the jury can figure out for itself, the testimony is not considered “helpful” and is not be admissible. See Baxter v. Melton, 218 Ga. App. 731 (1995). An expert’s testimony which moves beyond his or her realm of expertise is often said to be of no assistance to the jury and therefore inadmissible. See Johnson v. Knebel, 267 Ga. 853 (1997).

b. Qualifications.

A second requirement of this subsection is that the expert be qualified by knowledge, skill, experience, training or education. It is important to note that a witness can be qualified to offer “expert” testimony in a variety of ways, and formal education is

not a prerequisite. Provided the witness possesses knowledge beyond that of the average juror, the witness may be deemed an “expert,” even if he or she would not be considered an “expert” amongst his or her peers. See Drummond v. Gladson, 219 Ga. App. 521 (1995). At the same time, even if the witness has exemplary qualifications, it is important to remember that these qualifications go only so far as the witness’ area of expertise, and testimony which “overreaches” beyond that area of expertise is not admissible. See Everett v. Georgia-Pacific Corp., 949 F. Supp. 856 (S.D. Ga. 1996) (family medicine physician not qualified to testify that plaintiff’s inhalation of chemicals caused him to suffer from chronic respiratory ailments absent knowledge of toxicology); McLendon v. Georgia Kaolin Co., 841 F.Supp. 415 (M.D. Ga. 1994) (“economic geologist” not qualified to testify regarding value of a mineral where witness had minimal experience in evaluating the mineral for commercial use, the processes used to make the mineral commercially viable, or the market value of the mineral during the relevant time period).

c. Sufficiency of facts.

A third requirement of this subsection is that the expert’s opinion be based upon “sufficient facts or data which are or will be admitted into evidence at the trial or hearing.” Courts have long-required an expert’s opinion to have a sufficient factual predicate, and it is often said that an expert opinion that lacks a proper factual foundation is nothing more than “unscientific speculation offered by a genuine scientist.” See Rosen v. Ciba-Geigy Corp., 78 F.3d 316, 318 (7th Cir.1996). Where an expert has “assume[d] the very fact that he has been hired to prove, his testimony is not helpful to the trier of fact in determining that same fact in issue[,]” and is nothing more than “subjective

belief.” Clark v. Takata Corp., 192 F.3d 750 (7th Cir. 1999); see also Collier v. Varco-Pruden Buildings, 911 F.Supp. 189 (D.S.C. 1995) (expert testimony as to cause of plaintiff’s fall excluded because there was “insufficient evidence from which any person could determine what caused [the plaintiff] to fall[,]” and expert’s testimony “amount[ed] to nothing more than his speculation as to what ‘most likely’ happened.”).

While this statutory provision largely tracks its federal counterpart, it varies in one significant detail by adding the language underscored in the paragraph above. Read in conjunction with subsection (a), which allows an expert to base his or her opinion on inadmissible evidence if reasonably relied upon by others in the field, this language would appear to require that a certain minimum of the facts which form the basis of the expert’s opinion be admissible in evidence.

d. Reliable principles and methods.

A fourth requirement of this subsection is that the expert’s opinion be based upon reliable principles and methods. This requirement formed the crux of the Daubert decision, and the Daubert court articulated four (4) factors which courts may consider in making its reliability determination. It is important to note that the factors are non-exclusive, and that any given factor may or may not have applicability in any given situation. These factors are best viewed as indicia, or “badges,” of reliability - the more factors the expert’s the testimony can satisfy, the more likely it is that the expert’s testimony will be deemed sufficiently reliable so as to make its way to a jury.

The first of these factors is “whether a theory or technique can be (and has been) tested.” Id. at 593. “Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what

distinguishes science from other fields of human inquiry.” Id. As explained by one court, an expert must arrive at his conclusions using scientific methods and procedures, and his testimony should be excluded when based only on a “hypothesis” which has yet to be subjected “to the rigors of scientific testing.” Higgins v. Diversey Corp., 998 F.Supp. 598, 602 (D. Md. 1997).

A second factor is whether the expert’s theory or technique has been subjected to peer review and publication. Id. at 593. While Daubert was quick to point out that the absence of a theory or technique’s publication is not dispositive on the issue of reliability, it did observe that “submission to the scrutiny of the scientific community is a component of ‘good science,’ in part because it increases the likelihood that substantive flaws in methodology will be detected.” Id. at 593.

A third factor is the technique’s known or potential rate of error, and the existence of standards controlling the technique’s operation. Id. at 594. At the heart of these prongs of the Daubert inquiry are the concepts of “validity” and “reliability.” Validity asks the question: “does the principle support what it purports to show?” Id. at 590, n.9. Reliability asks the question: “does application of the principle produce consistent results?” Id. Several types of errors can occur in testing. Some of these errors may be random in nature, such as where a test produces a small number of results that are anomalous with the vast majority of results. Another error in the test can be a failure to account for data manipulation by the either the examiner or the subject. See, e.g. United States v. Birdsbill, 243 F.Supp.2d 1128 (D. Mont. 2003) (psychological test used in effort to demonstrate defendant had no pedophilic tendencies inadmissible in light of no mechanism to determine whether subject was falsifying test results). Other errors may be

more systemic in nature, such as where problems with the boundaries or parameters of the testing exist, leading to the reporting of “false positives” and “false negatives” in psychological testing.³ See Myers v. Arcudi, 947 F.Supp. 581 (D. Conn. 1996) (excluding expert’s testimony regarding polygraph results, noting that the testing supporting the accuracy of the polygraph results only referenced instances wherein a subject had failed the test and subsequently confessed; not referenced were those instances wherein an innocent person failed the test and a guilty person passed, resulting in “a skewing of the results of the study which may systematically overestimate the accuracy of the exam in determining deception or truthfulness.” Id. at 587.

The fourth factor articulated by Daubert was “general acceptance.” While Daubert rejected the “general acceptance” test as the *sine qua non* of reliability, it affirmed that a theory or method’s general acceptance within the relevant scientific community would continue to bear upon the reliability inquiry: “Widespread acceptance can be an important factor in ruling particular evidence admissible, and ‘a known technique which has been able to attract only minimal support within the community’ . . . may properly be viewed with skepticism.” Id. at 594.

e. Reliable application of principles to the facts.

A fifth requirement of the subsection is that the expert has “applied the principles and methods reliably to the facts of the case.” In General Elec. Co. v. Joiner, 522 U.S. 136, 118 S.Ct. 512 (1997), the United States Supreme Court held that trial courts should

³ Mara L. Merlino, *Judicial Application of Daubert to Psychological Syndrome and Profile Evidence*, 11 Psychol. Pub. Pol’y & L. 62 (2005). See Terrence W. Campbell, *Smoke and Mirrors: The Devastating Effect of False Sexual Abuse Claims* (1998), for a critique of “indicator lists” for child sexual abuse accommodation syndrome, arguing that use of such lists can result in an over-reporting of “false positives.”

not defer to the opinions offered by an expert simply by virtue of the witness' proclaimed expertise and superior knowledge, stating:

Trained experts commonly extrapolate from existing data. But nothing in either Daubert or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Id. at 146. As noted above, the “reliability” factors articulated by Daubert are non-exhaustive. In addition to the various factors identified above, other factors courts may look to in this determination may include: 1) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion (i.e. made too great an “analytical leap”); 2) whether the expert has been as careful in his or her work in this litigation as he or she would have been in non-litigation work; 3) whether the expert’s opinion grows naturally out of work independent of litigation; and 4) whether the expert has accounted for obvious alternative explanations.

For instance, in Cooper v. Smith & Nephew, Inc., 259 F.3d 194 (4th Cir. 2001), a physician seeking to testify that a patient’s failed back surgeries were caused by a defect in a manufacturer’s spinal fusion device failed to consider and rule out several alternative causes for the device’s failure as suggested in industry literature. In upholding the exclusion of the expert’s testimony, the court stated that where an “expert utterly fails to consider alternative causes or fails to offer an explanation for why the proffered alternative cause was not the sole cause, a district court is justified in excluding the expert’s testimony.” Id. 202. Similarly, in McGee v. Evenflo Co., 2003 W.L. 23350439 (M.D. Ga. 2003), a mechanical engineer seeking to opine that a product defect was the cause of the plaintiff’s injuries failed to conduct any tests, take any measurements, run

any calculations, or review any literature to support his conclusions. The court excluded the expert's testimony, noting that "[w]hile Brown's conclusions may be altogether accurate, he has done nothing in this case to show that they are." Id. at *10, 14.

IV. Specific Criteria Applicable to Professional Malpractice Cases.

A. Professional malpractice.

The foregoing rules are now applicable to all experts providing testimony in civil cases. However, additional criteria is applicable to experts providing testimony in "professional malpractice" cases, which would include an action alleging malpractice on the part of a psychologist. O.C.G.A. § 9-11-9.1. Subsection (c)(1) of O.C.G.A. § 24-9-67.1 requires that, at the time the negligence is alleged to have occurred, the expert must have been *licensed* by an appropriate regulatory agency in the state in which the expert was practicing or teaching.

These rules apply not only to experts *testifying* in professional malpractice action. Experts executing affidavits in conjunction with professional malpractice actions are subject to these requirements as well. O.C.G.A. § 24-9-67.1(e).

B. Medical malpractice.

Even further criteria is applicable to experts providing testimony in "medical malpractice" cases. O.C.G.A. § 24-9-67.1(c)(2). "Medical malpractice" is not defined under this statute, and an open question exists as to whether "psychological malpractice" would fall under the mantle of "medical malpractice" so as to make these further criteria applicable to experts testifying in cases of psychological malpractice. On one hand, subsection (c)(2) specifically identifies several types of "health care providers." Not

included among these are psychologists. This would indicate that experts in psychological malpractice actions are not subject to these additional requirements.

On the other hand, “medical malpractice” has generally been treated by the courts as including all professions engaged in the provision of health care. See O.C.G.A. § 51-2-5.1 (in defining a hospital’s liability for “health care professionals,” included within the definition of a health care professional is a wide range of professions, including psychologists); see also Jarallah v. Schwartz, 202 Ga. App. 32 (1991) (“While the appellee [psychologist] is not a physician and was not, strictly speaking, providing “medical care” to the appellant, it appears that the test results in question were in the nature of medical information[.]”). The existence of a psychologist-patient relationship is analyzed in the same way as the existence of a physician-patient relationship. See Scraeder v. Kohout, 239 Ga. App. 134 (1999). Similarly, the statute of limitations for malpractice actions against psychologists is the same statute applicable to physicians and other health care providers. O.C.G.A. § 9-3-70; see Charter Peachford Behavioral Health System, Inc. v. Kohout, 233 Ga. App. 452 (1998).

Subsection (c)(1) of O.C.G.A. § 24-9-67.1 requires that, in medical malpractice actions, the expert, at the time the negligence is alleged to have occurred, had “actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given[.]” This knowledge *and* experience must be the result of the expert having been regularly engaged in either:

- 1) The *actual practice* of the specialty or profession for at least 3 of the last 5 years. This practice must have occurred with “sufficient frequency” to establish

an “appropriate level of knowledge,” *as determined by the judge*, in performing the procedure, diagnosing the condition, or rendering the treatment at issue.

Or

2) The *teaching* of his or her profession for at least 3 of the last 5 years. The expert must have been an employed member of the faculty of an educational institution accredited in the teaching of the profession. This teaching must have occurred with “sufficient frequency” to establish an “appropriate level of knowledge,” *as determined by the judge*, in teaching others how to perform the procedure, diagnose the condition, or render the treatment at issue.

V. Conclusion.

Just as Daubert has had a dramatic impact on the way federal courts scrutinize expert testimony, Georgia’s enactment of O.C.G.A. § 24-9-67.1 is expected to significantly change the way in which state courts view the reliability, and admissibility, of expert testimony. Georgia has moved one step further than the federal courts with the implementation of additional rules specific to experts in professional and medical malpractice actions. Simply put, these rules are geared against the “professional expert.”

Daubert and its progeny enable a court to “pierce the veil” of a witness’ expertise to ensure that only that testimony which is supported by “good grounds” is permitted to influence a jury. As explained by one commentator, the “gatekeeping” role a trial judge plays under Daubert “is simply to guard the jury from considering as proof pure speculation presented in the guise of legitimate scientifically-based expert opinion. . . .

[I]t is to assure that an expert’s opinions are based on relevant scientific methods,

processes, and data, and not on mere speculation, and that they apply to the facts at issue.”⁴

⁴ Henry F. Fradella, et al., The Impact of Daubert on Forensic Science, 31 *Pepp. L.Rev.* 323, 329 (2004).

APPENDIX

GEORGIA'S OLD LAW: O.C.G.A. § 24-9-67

Experts; opinions admissible, when:

The opinions of experts on any question of science, skill, trade, or like questions shall always be admissible; and such opinions may be given on the facts as proved by other witnesses.

GEORGIA'S NEW LAW: O.C.G.A. § 24-9-67.1

- (a) The provisions of this Code section shall apply in all civil actions. The opinion of a witness qualified as an expert under this Code section may be given on the facts as proved by other witnesses. The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing or trial. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

- (b) If scientific, technical, or other specialized knowledge will assist the trier of fact in any cause of action 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 which are or will be admitted into evidence at the hearing or trial;
 - (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.

- (c) Notwithstanding the provisions of subsection (b) of this Code section and any other provision of law which might be construed to the contrary, in professional malpractice actions, the opinions of an expert, who is otherwise qualified as to the acceptable standard of conduct of the professional whose conduct is at issue, shall be admissible only if, at the time the act or omission is alleged to have occurred, such expert:
 - (1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state which such expert was practicing or teaching in the profession at such time; and
 - (2) In the case of a medical malpractice action, had actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given as the result of having been regularly engaged in:
 - A) The active practice of such area of specialty of his or her profession for at least three of the last five years, with sufficient frequency to establish an appropriate level of knowledge, as

determined by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; or

B) The teaching of his or her profession for at least three of the last five years as an employed member of the faculty of an educational institution accredited in the teaching of such profession, with sufficient frequency to establish an appropriate level of knowledge, as determined by the judge, in teaching others how to perform the procedure, diagnose the condition, or render the treatment which is alleged to have been performed or rendered negligently by the defendant whose conduct is at issue; and

C) Except as provided in subparagraph D) of this paragraph:

- (i) Is a member of the same profession;
- (ii) Is a medical doctor testifying as to the standard of care of a defendant who is a doctor of osteopathy; or
- (iii) Is a doctor of osteopathy testifying as to the standard of care of a defendant who is a medical doctor; and

D) Notwithstanding any other provision of this Code section, an expert who is a physician and, as a result of having, during at least three of the last five years immediately preceding the time the act or omission is alleged to have occurred, supervised, taught, or instructed nurses, nurse practitioners, certified registered nurse anesthetists, nurse midwives, physician's assistants, physical therapists, occupational therapist, or medical support staff, has knowledge of the standard of care of that health care provider under the circumstances at issue shall be competent to testify as to the standard of care of that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician's assistant, physical therapist, occupational therapist, or medical support staff shall not be competent to testify as to the standard of care of a physician.

- (d) Upon motion of a party, the court may hold a pretrial hearing to determine whether the witness qualifies as an expert and whether the expert's testimony satisfies the requirements of subsections (a) and (b) of this Code section. Such hearing and ruling shall be completed no later than the final pretrial conference contemplated under Code Section 9-11-16.
- (e) An affiant must meet the requirements of this Code section in order to be deemed qualified to testify as an expert by means of the affidavit required under Code Section 9-11-9.1.
- (f) It is the intent of the legislature that, in all civil cases, the courts of the State of Georgia not be viewed as open to expert evidence that would not be admissible in other states. Therefore, in interpreting and applying this Code section, the courts of this state may draw from the opinions of the

United States Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999); and other cases in federal courts applying the standards announced by the United States Supreme Court in these cases.

OVERVIEW/QUICK REFERENCE

This overview is intended to serve as a general outline of factors which courts may look to in considering the reliability, and ultimately the admissibility, of your testimony. Some of these considerations may or may not be applicable to the specific facts of your case. Where an inquiry can be responded to in the affirmative, you should be able to provide specific support - *ipse dixit* may not be enough.

1. Are your opinions sufficiently based on facts in the record (e.g. treatment records, depositions, etc.)?
2. Have the theories or techniques on which you rely been published and subjected to peer review?
3. Are the theories and techniques on which you rely generally accepted as reliable in the relevant community?
4. Have the theories and techniques on which you rely been tested, and are they capable of being tested?
5. Is there a known or potential error rate which falls within acceptable limits?
6. Are there controls to ensure the testing yields reliable results?
7. Have you considered and “ruled out” obvious alternative explanations?
8. Have you made too many assumptions, or have you assumed to be true a critical point in dispute?
9. Do your theories or techniques have non-litigation, or “real world,” application, or have they been developed for purposes of litigation?
10. Have you been as careful in this litigation as you would in your professional line of work?
11. Have you extrapolated from an accepted premise to an attenuated conclusion?
12. Are the theories or techniques you have employed in reaching your conclusions relevant to the issues in the case?