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**ARE WE THERE YET?: GATEKEEPERS, *DAUBERT*, AND AN ANALYSIS OF
*STATE V. WHITE***

I. INTRODUCTION

In April 2009, the South Carolina Supreme Court, in *State v. White (White II)*,¹ clarified the law regarding the admissibility of expert witness testimony in state courts.² Specifically, the court reinforced the notion that state court judges must act as “gatekeepers” to determine whether the testimony of expert witnesses, including the testimony of scientific and nonscientific experts, is reliable.³ This decision clarified a decision of the South Carolina Court of Appeals, which had held that the question of reliability of a nonscientific expert witness’s testimony was an issue for the jury to decide.⁴

However, in *White II* and in other cases, the South Carolina Supreme Court has repeatedly refused to adopt explicitly a version of the federal standard, expressed by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁵ used to determine the admissibility of expert witness testimony.⁶ Instead,

1. 382 S.C. 265, 676 S.E.2d 684 (2009).

2. *Id.* at 272–74, 676 S.E.2d at 687–89.

3. *Id.* at 270, 676 S.E.2d at 686.

4. See *State v. White (White I)*, 372 S.C. 364, 384, 642 S.E.2d 607, 617 (Ct. App. 2007), *aff’d on other grounds*, 382 S.C. 265, 676 S.E.2d 684 (2009).

5. 509 U.S. 579 (1993). The Court’s decision in *Daubert* was based on its interpretation of former Rule 702 of the Federal Rules of Evidence. See *id.* at 587–88. At the time *Daubert* was decided, Federal Rule 702 read, “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.” FED. R. EVID. 702 (1988) (amended 2000). The current South Carolina Rule 702 copies verbatim the language of the old federal rule. See S.C. R. EVID. 702. The amended Federal Rule 702 reflects the Supreme Court’s holding in *Daubert* and states 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.

FED. R. EVID. 702.

6. See, e.g., *State v. Jones*, 383 S.C. 535, 548 n.5, 681 S.E.2d 580, 587 n.5 (2009) (refusing to adopt *Daubert*); *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999) (same). The court in *White II* makes no reference to the *Daubert* standard. See *White II*, 382 S.C. 265, 676 S.E.2d 684. Currently, thirty states have adopted or applied the *Daubert* standard to determine whether to admit a witness to testify as an expert in a given field. See *State v. Coon*, 974 P.2d 386, 402 (Alaska 1999); *Farm Bureau Mut. Ins. Co. of Ark. v. Foote*, 14 S.W.3d 512, 519 (Ark. 2000); *People v. Shreck*, 22 P.3d 68, 78 (Colo. 2001); *State v. Porter*, 698 A.2d 739, 742 (Conn. 1997); *Nelson v. State*, 628 A.2d 69, 73–74 (Del. 1993); *Agri-Cycle LLC v. Couch*, 663 S.E.2d 175, 179 (Ga. 2008); *State v. Escobido-Ortiz*, 126 P.3d 402, 410 (Haw. Ct. App. 2005) (citing *State v. Vliet*, 19 P.3d 42, 53 (Haw. 2001)); *State v. Parkinson*, 909 P.2d 647, 652 (Idaho Ct. App. 1996); *Kempf Contracting & Design, Inc. v. Holland-Tucker*, 892 N.E.2d 672, 677 (Ind. Ct. App. 2008) (citing *Shafer & Freeman Lakes Envtl. Conservation Corp. v. Stichnoth*, 877 N.E.2d 475, 484 (Ind. Ct. App. 2007)); *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 531 (Iowa 1999); *Burton v. CSX Transp.*,

South Carolina has insisted on following its own courts' interpretation of South Carolina Rules of Evidence Rule 702⁷ and South Carolina's common law rule.⁸ Thus, after *White II*, questions still remain: What is the effect of the court's decision in *White II*, and has the court gone far enough to ensure that state trial judges play a meaningful role in determining the admissibility of expert witnesses?

Part II of this Note will discuss the details of *Daubert* and its progeny. Part III will describe the historical South Carolina approach up to the court's decision in *White II*, and Part IV will discuss in detail the court's opinion in *White II*. Finally, Part V will discuss the effect that *White II* will have in South Carolina. On one hand, the decision emphasizes the important gatekeeping role of trial judges in determining the admissibility of expert witnesses in state courts. The court's opinion makes unequivocally clear that trial judges must exercise their duty as gatekeepers to determine the admissibility of scientific and nonscientific expert witnesses. However, the decision does not go far enough. Specifically, the refusal of the court to adopt *Daubert* explicitly and to provide a procedural mechanism by which a trial court can thoroughly assess an expert witness's reliability leaves some to be desired. Thus, because deficiencies still exist in the area of admissibility of expert testimony, the South Carolina Supreme Court should take the additional step of explicitly adopting the *Daubert* standard by amending the state's rules that address expert witness testimony in order to bring the state's law in line with federal practice.

Inc., 269 S.W.3d 1, 6 (Ky. 2008) (citing *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 39 (Ky. 2004)); *State v. Foret*, 628 So. 2d 1116, 1123 (La. 1993); *State v. MacDonald*, 718 A.2d 195, 198–99 (Me. 1998); *Commonwealth v. Lanigan*, 641 N.E.2d 1342, 1349 (Mass. 1994); *Gilbert v. DaimlerChrysler Corp.*, 685 N.W.2d 391, 408 (Mich. 2004); *Miss. Transp. Comm'n v. McLemore*, 863 So. 2d 31, 35 (Miss. 2003); *State v. Price*, 171 P.3d 293, 298 (Mont. 2007) (citing *State v. Cline*, 909 P.2d 1171, 1177 (Mont. 1996)) (limiting application of *Daubert* to novel scientific evidence); *Fickle v. State*, 735 N.W.2d 754, 770 (Neb. 2007); *State v. Hungerford*, 697 A.2d 916, 925 (N.H. 1997); *State v. Alberico*, 861 P.2d 192, 203–04 (N.M. 1993); *Miller v. Bike Athletic Co.*, 687 N.E.2d 735, 740 (Ohio 1998); *Scruggs v. Edwards*, 154 P.3d 1257, 1259 (Okla. 2007); *State v. O'Key*, 899 P.2d 663, 672 (Or. 1995); *State v. Morel*, 676 A.2d 1347, 1355 n.2 (R.I. 1996); *State v. Hofer*, 512 N.W.2d 482, 484 (S.D. 1994); *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 265 (Tenn. 1997); *E.I. du Pont de Nemours & Co. v. Robinson*, 923 S.W.2d 549, 556 (Tex. 1995); *State v. Brooks*, 643 A.2d 226, 229 (Vt. 1993); *Wilt v. Buracker*, 443 S.E.2d 196, 203 (W. Va. 1993); *Springfield v. State*, 860 P.2d 435, 443 (Wyo. 1993).

7. S.C. R. EVID. 702.

8. See, e.g., *Council*, 335 S.C. at 19–20, 515 S.E.2d at 517–18 (citing *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979)) (rejecting the *Daubert* rule in favor of the *Jones* common law rule, which is in accord with the state's Rule 702).

II. BACKGROUND

A. Daubert v. Merrell Dow Pharmaceuticals, Inc.

In *Daubert*, the United States Supreme Court provided one of the most important decisions regarding evidentiary proceedings and the admissibility of expert testimony. The Supreme Court held that Rule 702 of the Federal Rules of Evidence⁹ usurped the old rule laid out in *Frye v. United States*¹⁰ regarding the admissibility of expert testimony.¹¹ Under the *Frye* rule, expert testimony was admitted if the methodology the expert used to reach the conclusion was a generally accepted methodology within the scientific community.¹²

In *Daubert*, the Supreme Court found that Rule 702 does not include any language requiring that an expert's methodology be generally accepted within the relevant community.¹³ Instead, the Court established a broader requirement—that an expert witness's testimony must be reliable and must assist the trier of fact.¹⁴ The importance of *Daubert* relates to the reliability prong of this requirement and the factors set forth by the Supreme Court to determine reliability.

The issue of reliability of expert testimony requires courts to “determine whether the *proffered opinions* satisfy [the factors]. This step . . . focuses on the opinions themselves, rather than the expert's qualifications.”¹⁵ The Supreme Court offered a nonexhaustive list of factors to determine whether an expert's testimony is reliable, including whether the theory or technique can be tested; “whether [it] has been subjected to peer review and publication”; whether it has

9. FED. R. EVID. 702 (1988) (amended 2000).

10. 293 F. 1013, 1014 (D.C. Cir. 1923), *superseded by rule*, FED. R. EVID. 702, *as recognized in Daubert*, 509 U.S. at 587–89.

11. *Daubert*, 509 U.S. at 587.

12. *Frye*, 293 F. at 1014. Some states still use the *Frye* test. *See, e.g.*, *State v. Tankersley*, 956 P.2d 486, 491 (Ariz. 1998) (rejecting the invitation to adopt the *Daubert* test and instead adhering to *Frye*); *Montgomery Mut. Ins. Co. v. Chesson*, 923 A.2d 939, 946 (Md. 2007) (citing *Reed v. State*, 391 A.2d 364, 372 (Md. 1978)) (applying *Frye*). However, the test has been subject to much scholarly criticism, particularly prior to the Supreme Court's *Daubert* decision in 1993. *See, e.g.*, Andre A. Moenssens, *Admissibility of Scientific Evidence—An Alternative to the Frye Rule*, 25 WM. & MARY L. REV. 545, 562 (1984) (“The *Frye* test's insistence on general acceptance is based on the erroneous assumption ‘that the scientific community speaks with a single voice on the acceptance of novel scientific procedures.’” (quoting *Symposium on Science and the Rules of Evidence*, 99 F.R.D. 187, 221 (1983))).

13. *Daubert*, 509 U.S. at 588.

14. *See id.* at 590–91 (discussing the requirements of reliability and relevance under Rule 702); *see also United States v. Crisp*, 324 F.3d 261, 268 (4th Cir. 2003) (“The touchstones for admissibility under *Daubert* are two: reliability and relevancy.” (citing *Daubert*, 509 U.S. at 589, 597)).

15. *Fernandez v. Spar Tek Indus., Inc.*, No. 0:06-3253-CMC, 2008 WL 2185395, at *1 (D.S.C. May 23, 2008); *see also TFWs, Inc. v. Schaefer*, 325 F.3d 234, 240 (4th Cir. 2003) (“In applying *Daubert*, a court evaluates the methodology or reasoning that the proffered scientific or technical expert uses to reach his conclusion; the court does not evaluate the conclusion itself.”).

an acceptable rate of error; and whether it has gained general acceptance in the relevant scientific community.¹⁶ No single factor is dispositive.¹⁷ Regarding the requirement that the testimony must assist the trier of fact, the Court noted that “[t]his condition goes primarily to relevance”¹⁸ and that the “standard requires a valid scientific connection to the pertinent inquiry as a precondition to admissibility.”¹⁹

The trial judge’s role in evidentiary proceedings, specifically in deciding whether to admit an expert’s testimony, was one of the factors considered by the court in *Daubert*.²⁰ The Court pointed out that experts are “permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.”²¹ Furthermore, in certain types of cases, such as products liability cases, expert testimony is often the “primary tool in deciding whether a particular product was defective and whether that defect caused the plaintiff’s injury.”²² Thus, a trial judge’s decision whether to admit an expert’s testimony into evidence can be outcome determinative.²³ Because of the

16. *Daubert*, 509 U.S. at 593–94. While the Supreme Court enumerated these specific factors to determine reliability, the Court also stressed the importance of flexibility in applying the factors. *Id.* at 594.

17. *See id.* at 593; *see also* *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 261 (4th Cir. 2005) (“As the gatekeeper, the district court should analyze the proposed expert testimony using several factors” (citing *Daubert*, 509 U.S. at 592–94)).

18. *Daubert*, 509 U.S. at 591.

19. *Id.* at 591–92.

20. *Id.* at 592 (citing FED. R. EVID. 104(a)).

21. *Id.*; *see also* Warren Moïse, *Witch Doctors: Part I (A Mostly Non-Daubert Look at Expert Witnesses)*, S.C. LAW., Jan. 2005, at 11, 12 (acknowledging the potential abuses of expert witness testimony and the “dangers of expert quacks, weird science and raw speculation”). Judge Learned Hand provided informative insight on the issue of expert testimony:

The whole object of the expert is to tell the jury, not facts, as we have seen, but general truths derived from his specialized experience. But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.

Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 54 (1901). Because of the powerful ability of an expert witness to persuade a jury, the trial judge must act as a guardian to prevent unreliable expert testimony from reaching the jury. *See, e.g.*, *United States v. Addison*, 498 F.2d 741, 744 (D.C. Cir. 1974) (noting one of the potential problems of expert testimony is the danger that the testimony will “assume a posture of mystic infallibility in the eyes of a jury of laymen”); Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence: Frye v. United States, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1237 (1980) (“The major danger of scientific evidence is its potential to mislead the jury; an aura of scientific infallibility may shroud the evidence and thus lead the jury to accept it without critical scrutiny.” (footnote omitted)).

22. David G. Owen, *A Decade of Daubert*, 80 DENV. U. L. REV. 345, 346 (2002); *see also* Joel Cooper et al., *Complex Scientific Testimony: How Do Jurors Make Decisions?*, 20 LAW & HUM. BEHAV. 379, 380 (1996) (“In complex litigation, expert witnesses are often the primary source of substantive evidence in the case.”).

23. *See, e.g.*, Ken Suggs, *Amendments to the Federal Rules: The Bad Guys Win Again*, S.C. LAW., May/June 2001, at 45, 46 (“The fact is, *Daubert* and its progeny give absolute license to judges to keep cases away from juries.”).

heightened role of expert witness testimony, the court's role as a gatekeeper is of utmost importance.

B. Kumho Tire Co. v. Carmichael

After *Daubert*, the federal courts questioned whether the gatekeeping function of the trial court applied to technical and other specialized fields or whether the Supreme Court intended *Daubert* to be restricted only to scientific expert testimony.²⁴ In *Kumho Tire Co. v. Carmichael*,²⁵ the Supreme Court held that the principles from *Daubert* also apply to nonscientific knowledge, including technical and specialized knowledge.²⁶ The Court gave two reasons why *Daubert* should apply to technical and specialized knowledge. First, it noted that Rule 702 does not distinguish between scientific expert testimony and other types of expert testimony.²⁷ Instead, the Court reasoned that the reliability requirements from *Daubert* apply to all forms of "knowledge," including scientific, technical, and other specialized forms.²⁸ The Court pointed out that *Daubert* stressed that knowledge was the significant requirement of Rule 702 and that the reason *Daubert* mentioned only scientific expert testimony was that it had no other type of expert evidence to consider.²⁹ Second, the Court in *Kumho* noted the practical problems for the trial court if it had to distinguish between scientific expert testimony and technical or other specialized expert testimony because there is no clear line between—or definition of—those terms.³⁰ Because science is often the basis for technical and other specialized fields, confusion could arise in distinguishing the terms.³¹

The Court also emphasized that the factors determining reliability enumerated in *Daubert* were not exhaustive and that the Court intended the rule

24. Compare *Watkins v. Telsmith, Inc.*, 121 F.3d 984, 990 (5th Cir. 1997) (rejecting the argument that *Daubert* applies only to scientific expert testimony and instead applying the test to technical expert testimony), and *Cummins v. Lyle Indus.*, 93 F.3d 362, 367 n.2 (7th Cir. 1996) (applying *Daubert* to determine the admissibility of a technical engineering expert), with *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997) (restricting *Daubert* only to scientific expert testimony and refusing to apply the rule to specialized knowledge), and *Compton v. Subaru of Am., Inc.*, 82 F.3d 1513, 1518 (10th Cir. 1996) (refusing to apply *Daubert* to nonscientific expert testimony and restricting the rule to experts who utilize a principle or methodology), *overruled by Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). One court that rejected the use of *Daubert* when determining the admissibility of nonscientific expert testimony reasoned that it was "unwarranted in cases where expert testimony is based solely upon experience or training." *Compton*, 82 F.3d at 1518.

25. 526 U.S. 137 (1999).

26. *Id.* at 141.

27. *Id.* at 147 ("[The] language [of Rule 702] makes no relevant distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge.").

28. *Id.* (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589–90 (1993)).

29. *Id.* at 147–48 (citing *Daubert*, 509 U.S. at 590 n.8).

30. *Id.* at 148.

31. See *id.* ("Disciplines such as engineering rest upon scientific knowledge.").

to be “‘flexible.’”³² The Court noted, “*Daubert* makes clear that the factors it mentions do *not* constitute a ‘definitive checklist or test.’”³³ The Court also reasserted the importance of the trial judge’s role as a gatekeeper, noting that the judge’s responsibility “is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”³⁴

C. Other Important *Daubert* Progeny: Joiner and Weisgram

The United States Supreme Court has expanded its holding in *Daubert* in two cases besides *Kumho*. In *General Electric Co. v. Joiner*,³⁵ the Court emphasized that an appellate court should review the trial judge’s decision regarding the admissibility of expert testimony with an abuse of discretion standard of review.³⁶ Highlighting the role of the trial judge as a gatekeeper, the Court reasoned that appellate courts must give deference to the determinations made by trial judges.³⁷ Because appellate courts must use an abuse of discretion standard of review, trial judges have wide discretion in making *Daubert* rulings.³⁸

In *Weisgram v. Marley Co.*,³⁹ the Court held that the plaintiff, whose verdict was reversed by the Eighth Circuit Court of Appeals because the trial court relied on expert testimony that should have been excluded under *Daubert*,⁴⁰ should not be afforded remand to introduce new evidence to shore up his case.⁴¹ While *Weisgram* is in many ways an analysis of Rule 50 of the Federal Rules of Civil Procedure,⁴² it emphasizes the importance the Court has placed on the reliability of expert testimony and the burden on litigants to introduce reliable evidence during trial.⁴³ Because litigants are on “notice of the exacting standards

32. *Id.* at 150 (quoting *Daubert*, 509 U.S. at 594).

33. *Id.* (quoting *Daubert*, 509 U.S. at 593). A federal district court in South Carolina has acknowledged several other factors that *Daubert* did not expressly list, including “whether the expert’s analysis leaves unexplained analytical gaps and whether the expert has reasonably accounted for alternative explanations.” *Nucor Corp. v. Bell*, No. 2:06-CV-02972-DCN, 2008 WL 4442571, at *2 (D.S.C. Jan. 11, 2008).

34. *Kumho*, 526 U.S. at 152.

35. 522 U.S. 136 (1997).

36. *Id.* at 141, 143.

37. *Id.* at 142–43. The Court noted that while the Federal Rules of Evidence may allow a broader range of expert testimony than the former *Frye* rule, “they leave in place the ‘gatekeeper’ role of the trial judge in screening such evidence.” *Id.* at 142.

38. *See United States v. Abel*, 469 U.S. 45, 54 (1984).

39. 528 U.S. 440 (2000).

40. *Id.* at 443.

41. *Id.* at 455–56.

42. *See id.* at 443 (“Our decision is guided by Federal Rule of Civil Procedure 50 . . .”).

43. *See id.* at 455–57 (affirming appellate court’s determination that absent expert testimony the plaintiff’s evidence did not support the jury’s verdict).

of reliability,” they must ensure that they provide the best expert testimony at trial.⁴⁴ If a litigant fails to utilize his strongest evidence initially, an appellate court need not afford the litigant the opportunity to introduce additional evidence by remanding the case to the trial court but may direct the trial court to enter judgment.⁴⁵

III. THE SOUTH CAROLINA APPROACH

South Carolina’s requirements for expert testimony deviate from the requirements of the federal courts.⁴⁶ The current version of South Carolina’s rule governing the admissibility of expert testimony is the same as former Federal Rule 702, but South Carolina has not adopted an amendment that reflects the holding in *Daubert*.⁴⁷ Generally, the requirements for experts to testify in South Carolina courts are easy to satisfy, and “courts allow experts to testify if they are more qualified in the field than a juror on the subject.”⁴⁸ To testify as an expert, a witness does not need to be a professional.⁴⁹ Likewise, “[d]efects in an expert witness’[s] education and experience go to the weight, not the admissibility, of the expert’s testimony.”⁵⁰ Finally, decisions regarding the admissibility of expert testimony are within the sound discretion of the trial judge.⁵¹

The leading case on the requirements in South Carolina for the admissibility of expert testimony is *State v. Council*.⁵² The South Carolina Supreme Court noted that it has never followed the displaced *Frye* standard or the current *Daubert* standard;⁵³ instead, South Carolina courts rely on Rule 702 of the South Carolina Rules of Evidence and the common law rule of *State v. Jones*⁵⁴ to determine reliability.⁵⁵ According to the *Jones* standard, the question of admissibility turns on “the degree to which the trier of fact must accept, on faith, scientific hypotheses not capable of proof or disproof in court and not even

44. *Id.* at 455 (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)).

45. *Id.* at 444.

46. *See, e.g.*, *State v. Council*, 335 S.C. 1, 19–20, 515 S.E.2d 508, 517–18 (1999) (noting that South Carolina has never expressly adopted the *Daubert* standard or the *Frye* rule).

47. *See supra* notes 5–6 and accompanying text.

48. *Peterson v. Nat’l R.R. Passenger Corp.*, 365 S.C. 391, 399, 618 S.E.2d 903, 907 (2005) (citing *Gooding v. St. Francis Xavier Hosp.*, 326 S.C. 248, 252–53, 487 S.E.2d 596, 598 (1997)).

49. *Gadson v. Mikasa Corp.*, 368 S.C. 214, 228, 628 S.E.2d 262, 270 (Ct. App. 2006) (citing *Gooding*, 326 S.C. at 253, 487 S.E.2d at 598).

50. *Peterson*, 365 S.C. at 399, 618 S.E.2d at 907 (citing *Gooding*, 326 S.C. at 253, 487 S.E.2d at 598).

51. *Prince v. Associated Petrol. Carriers*, 262 S.C. 358, 365, 204 S.E.2d 575, 579 (1974) (per curiam).

52. 335 S.C. 1, 515 S.E.2d 508 (1999).

53. *Id.* at 19–20, 515 S.E.2d at 517–18.

54. 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979) (citing *People v. Marx*, 126 Cal. Rptr. 350, 355–56 (Ct. App. 1975)).

55. *Council*, 335 S.C. at 19–20, 515 S.E.2d at 517–18.

generally accepted outside the courtroom.”⁵⁶ When utilizing the *Jones* standard, courts in South Carolina typically look to several factors to determine reliability, including “(1) the publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) the quality control procedures used to ensure reliability; and (4) the consistency of the method with recognized scientific laws and procedures.”⁵⁷

The court in *Council* noted that, before South Carolina adopted Rule 702,⁵⁸ it had never followed the *Frye* rule.⁵⁹ The court stated that the *Jones* “standard is more liberal than the *Frye* standard.”⁶⁰ Similar to the United States Supreme Court’s analysis in *Daubert*, the South Carolina Supreme Court found that “the proper analysis for determining admissibility of scientific evidence is now under the [South Carolina Rules of Evidence].”⁶¹ Thus, like the federal rule, the court found that South Carolina Rule 702 requires that expert testimony assist the trier of fact and be reliable, and that the expert is adequately qualified.⁶² However, instead of determining reliability based on the *Daubert* factors, the court in *Council* held that state courts should follow the *Jones* factors.⁶³

A comparison of the *Jones* factors and the factors from *Daubert* shows similarities. Both standards suggest that peer review is an important—though not required—element of reliability.⁶⁴ Likewise, both standards stress the importance of testability, that is, whether the method employed by the expert is capable of repetition.⁶⁵ However, one significant factor missing from the *Jones* standard

56. *Jones*, 273 S.C. at 731, 259 S.E.2d at 124 (citing *Marx*, 126 Cal. Rptr. at 355–56).

57. *Council*, 335 S.C. at 19, 515 S.E.2d at 517 (citing *State v. Ford*, 301 S.C. 485, 488–90, 392 S.E.2d 781, 783–84 (1990)).

58. The predecessor of Rule 702 was Rule 24 of the South Carolina Rules of Criminal Procedure, S.C. R. CRIM. P. 24 (1990) (repealed 1995), which is identical in language. *Council*, 335 S.C. at 20, 515 S.E.2d at 518; see also S.C. R. EVID. 702 notes (“The rule is identical to . . . former Rule 24(a) . . .”).

59. *Council*, 335 S.C. at 19, 515 S.E.2d at 517.

60. *Id.*

61. *Id.* at 20, 515 S.E.2d at 518.

62. *Id.*

63. *Id.* Analytically, the South Carolina Supreme Court used the same logic as the United States Supreme Court, compare *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 593–94 (1993) (listing and explaining factors for determining the reliability of an expert’s testimony), with *Council*, 335 S.C. at 20, 515 S.E.2d at 518 (“When admitting scientific evidence under Rule 702, SCRE, the trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable.”), but held that the *Jones* factors sufficiently encompass South Carolina’s Rule 702, see *Council*, 335 S.C. at 20, 515 S.E.2d at 518. Thus, the *Daubert* factors are not necessary to determine the admissibility of expert testimony. *Id.*

64. Compare *Daubert*, 509 U.S. at 593 (listing peer review as a relevant factor), with *Council*, 335 S.C. at 19, 515 S.E.2d at 517 (citing *State v. Ford*, 301 S.C. 485, 488, 392 S.E.2d 781, 783 (1990)) (same).

65. Compare *Daubert*, 509 U.S. at 593 (listing testability as a relevant factor), with *Council*, 335 S.C. at 19, 515 S.E.2d at 517 (citing *Ford*, 301 S.C. at 488, 392 S.E.2d at 783) (same).

that is present in *Daubert* is general acceptance within the relevant field.⁶⁶ This factor, which was the exclusive factor of the now obsolete *Frye* standard,⁶⁷ is one that litigants in both *Council*⁶⁸ and *Jones*⁶⁹ argued but that the South Carolina Supreme Court discarded as a requirement in *Council*.⁷⁰

Before *White II*, there was also a question as to whether the *Jones* factors apply to nonscientific expert testimony such as technical or other specialized knowledge. Unlike federal courts after 1999,⁷¹ some South Carolina state courts had distinguished scientific expert testimony from nonscientific expert testimony and had applied different evidentiary standards for the admissibility of nonscientific expert testimony.⁷² The first South Carolina case to make such a distinction was *State v. Whaley*.⁷³ There, the court distinguished the expert testimony of a psychology professor from testimony of other “scientific” experts, such as those who testify regarding “DNA test results, blood spatter interpretation, and bite mark comparisons.”⁷⁴ The court did not apply the *Jones* reliability test to the psychology professor’s testimony because the testimony “simply explains how certain aspects of every day experience shown by the record can affect human perception and memory.”⁷⁵ In *State v. Douglas (Douglas I)*,⁷⁶ the South Carolina Court of Appeals stated that the *Jones* factors apply only to scientific expert testimony and that if expert testimony does not fall within the purview of *Jones*, then questions of reliability ““go only to the weight, but not admissibility, of the testimony.””⁷⁷

66. Compare *Daubert*, 509 U.S. at 594 (listing general acceptance as a relevant factor), with *Council*, 335 S.C. at 19, 515 S.E.2d at 517 (citing *Ford*, 301 S.C. at 488–90, 392 S.E.2d at 783–84) (listing the *Jones* factors, which do not include general acceptance as a relevant factor).

67. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), superseded by rule, FED. R. EVID. 702, as recognized in *Daubert*, 509 U.S. at 587–89.

68. *Council*, 335 S.C. at 19, 515 S.E.2d at 517.

69. *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979).

70. *Council*, 335 S.C. at 19, 515 S.E.2d at 517.

71. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (applying the *Daubert* standard to both scientific and nonscientific expert testimony).

72. See, e.g., *State v. Whaley*, 305 S.C. 138, 141–42, 406 S.E.2d 369, 371–72 (1991) (distinguishing testimony regarding the psychology of eyewitness identification from DNA test results, blood spatter interpretation, and bite mark analysis as nonscientific); *White I*, 372 S.C. 364, 376, 642 S.E.2d 607, 613 (Ct. App. 2007) (“[N]ot all expert testimony is subject to a *Jones* analysis.” (citing *State v. Douglas (Douglas I)*, 367 S.C. 498, 509–10, 626 S.E.2d 59, 65 (Ct. App. 2006), rev’d on other grounds, *State v. Douglas (Douglas II)*, 380 S.C. 499, 504, 671 S.E.2d 606, 609 (2009))), aff’d on other grounds, 382 S.C. 265, 676 S.E.2d 684 (2009).

73. 305 S.C. 138, 406 S.E.2d 369 (1991).

74. *Id.* at 142, 406 S.E.2d at 371.

75. *Id.* at 142, 406 S.E.2d at 371–72 (citing *People v. McDonald*, 690 P.2d 709, 724 (Cal. 1984), overruled by *People v. Mendoza*, 4 P.3d 265 (Cal. 2000)).

76. 367 S.C. 498, 626 S.E.2d 59 (Ct. App. 2006), rev’d on other grounds, 380 S.C. 499, 504, 671 S.E.2d 606, 609 (2009).

77. *Id.* at 510, 626 S.E.2d at 65 (quoting *State v. Morgan*, 326 S.C. 503, 513, 485 S.E.2d 112, 118 (Ct. App. 1997), overruled by *White II*, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009)).

The reasoning provided by courts for limiting *Jones* to scientific expert testimony is that *Jones*'s narrow purpose was "to prevent the aura of infallibility which surrounds 'scientific hypotheses not capable of proof or disproof in court and not even generally accepted outside the courtroom' from misleading the fact finders."⁷⁸ Thus, "a trial court's threshold inquiry is whether the expert's methods and techniques even fall within *Jones*'s central purpose."⁷⁹ According to this reasoning, the *Jones* factors apply only to scientific expert testimony because of the special nature of the testimony. Because of the so-called aura of infallibility attached to scientific expert testimony, such testimony should be particularly safeguarded from jurors.⁸⁰

However, this reasoning is problematic. First, as the United States Supreme Court noted in *Kumho*, it can be extremely difficult to differentiate between scientific and nonscientific expert testimony.⁸¹ It would be difficult, if not impossible, to create a bright-line test distinguishing these two types of expert testimony.⁸² Second, this reasoning disregards the underlying importance and role of the trial judge in evidentiary proceedings. In *Daubert*, the United States Supreme Court stressed the importance of the gatekeeper function of the trial judge.⁸³ This role may be most important with regard to screening scientific expert testimony because juries give great weight to such testimony.⁸⁴ However,

78. *White I*, 372 S.C. 364, 376, 642 S.E.2d 607, 613 (Ct. App. 2007) (emphasis added) (quoting *Morgan*, 326 S.C. at 513, 485 S.E.2d at 117–18), *aff'd on other grounds*, 382 S.C. 265, 676 S.E.2d 684 (2009).

79. *Morgan*, 326 S.C. at 513, 485 S.E.2d at 117 (citing *State v. Jones*, 273 S.C. 723, 731, 259 S.E.2d 120, 124 (1979)).

80. Before *White II*, there was one South Carolina Supreme Court case that suggested, in dicta, that the *Jones* factors apply to the admissibility of nonscientific experts. See *Moriarty v. Garden Sanctuary Church of God*, 341 S.C. 320, 331–32, 534 S.E.2d 672, 678 (2000) (referring to *Kumho* for the proposition that a trial judge's gatekeeping function applies to both scientific and nonscientific expert testimony), *modified*, *State v. Cherry*, 361 S.C. 588, 602 n.14, 606 S.E.2d 475, 482 n.14 (2004).

81. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999) (relying on this argument to apply *Daubert* to nonscientific expert testimony). The dictionary definition of *engineering* illustrates this point. RANDOM HOUSE WEBSTER'S UNABRIDGED DICTIONARY 645 (2d ed. 2001) (defining *engineering* as "the art or science of making practical application of the knowledge of pure sciences").

82. See *Kumho*, 526 U.S. at 148 ("[C]onceptual efforts to distinguish [scientific knowledge from technical knowledge] are unlikely to produce clear legal lines capable of application in particular cases.").

83. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993).

84. 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, 789 (1994) ("[S]cientific testimony may sway a jury even when as science it is palpably wrong."); Cooper et al., *supra* note 22, at 382 ("When the evidence is scientifically complex, jurors may rely on the credentials of the expert, for example, as a clue to the validity of his or her testimony rather than trying to process the content of the message."). Cooper, Bennett, and Sukel conducted an empirical study to analyze the effect that different witnesses with varying credibility would have on a jury, and they found that jurors were more likely to be persuaded when an expert had higher credentials. Cooper et al., *supra* note 22, at

the underlying purpose of *Daubert* still applies to other forms of expert testimony because a jury just as easily can be swayed by a nonscientific expert witness.⁸⁵ Just as a judge plays an important role in determining the admissibility of evidence based on factors such as credibility, relevance, and prejudice,⁸⁶ a judge should play a significant role in determining the admissibility of all expert testimony based on the expert's reliability.⁸⁷ The detrimental effect of unreliable expert testimony is arguably just as great with technical, nonscientific testimony as it is for scientific testimony.

IV. *WHITE II*: A CLARIFICATION FROM THE SOUTH CAROLINA SUPREME COURT

In light of the opinion of the South Carolina Court of Appeals in *White I* that the issue of reliability of a nonscientific expert witness's testimony goes to the weight of the evidence as opposed to admissibility,⁸⁸ the South Carolina Supreme Court in *White II* sought to clarify the law in the state regarding expert witness testimony.⁸⁹ The case involved a defendant, Gary White, who was convicted of armed robbery and kidnapping.⁹⁰ The defendant had fled from the scene of the crime, but the police were able to apprehend him with the assistance of a K9 unit.⁹¹ During trial, the State moved to qualify as an expert witness the police officer who, with the assistance of his tracking dog, tracked down and

387 (“[M]ore mock jurors found for the plaintiff when his case was presented with highly complex arguments by an expert with high credentials . . .”).

85. See, e.g., *Sunland Constr. Co. v. City of Myrtle Beach*, No. 4:05-cv-1227-RBH, 2007 WL 2822509, at *3 (D.S.C. Sept. 26, 2007) (“The trial judge’s gatekeeping function applies not only to scientific testimony, but to all expert testimony.” (citing *Kumho*, 526 U.S. at 147)). In his dissent in *Douglas II*, Justice Pleicones, emphasizing the role of the trial judge as a gatekeeper, noted that “qualification as an expert clothes the witness with an air of authority that does not attach to ‘ordinary’ witnesses.” 380 S.C. 499, 506, 671 S.E.2d 606, 610 (2009) (Pleicones, J., dissenting). Professor Laurence Tribe recalls the trial of Alfred Dreyfus, the nineteenth century Frenchman who was falsely convicted of treason, as an example of elaborate and complex (and also nonsensical) testimony by expert mathematicians persuading a jury to convict Dreyfus even though the jury had no understanding of the evidence. Laurence H. Tribe, *Trial By Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1332–34 (1971). Although anecdotal, this example does illustrate a simple point: it is the aura of expertise, not just science, that has the power to persuade a jury.

86. See, e.g., FED. R. EVID. 402 (“All relevant evidence is admissible . . . Evidence which is not relevant is not admissible.”); S.C. R. EVID. 402 (same); FED. R. EVID. 403 (“[E]vidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . .”); S.C. R. EVID. 403 (same). Under both the Federal Rules of Evidence, FED. R. EVID. 104(a), and the South Carolina Rules of Evidence, S.C. R. EVID. 104(a), the judge determines admissibility.

87. *Kumho*, 526 U.S. at 149 (citing *Daubert*, 509 U.S. at 592).

88. *White I*, 372 S.C. 364, 376, 642 S.E.2d 607, 613 (Ct. App. 2007) (citing *State v. Morgan*, 326 S.C. 503, 513, 485 S.E.2d 112, 118 (Ct. App. 1997), *overruled by White II*, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009)), *aff’d on other grounds*, 382 S.C. 265, 676 S.E.2d 684.

89. *White II*, 382 S.C. at 272, 676 S.E.2d at 687–88.

90. *Id.* at 268, 676 S.E.2d at 685. White and another cohort had robbed a convenience store. *Id.* at 267, 676 S.E.2d at 685.

91. *Id.* at 268, 676 S.E.2d at 685.

apprehended the defendant.⁹² The trial court judge qualified the officer “as an expert in the field of K9 tracking and handling,” and the defendant objected to the testimony, partly on the ground that it was not reliable.⁹³ After a jury returned a guilty verdict, the defendant appealed.⁹⁴

The court of appeals affirmed the verdict and concluded that “[i]f the expert’s opinion does not fall within *Jones*, questions about the reliability of an expert’s methods go only to the weight, but not admissibility, of the testimony.”⁹⁵ According to the court in *White I*, “[a] trial court’s threshold inquiry is whether the expert’s methods and techniques even fall within *Jones*’ central purpose: to prevent the aura of infallibility which surrounds ‘scientific hypotheses.’”⁹⁶ Moreover, the court concluded that dog tracking evidence falls outside the scope of *Jones* because it is nonscientific expert testimony and thus that such “evidence is not required to meet the scientific evidence standard articulated . . . in *Jones*.”⁹⁷

The South Carolina Supreme Court granted the defendant’s writ of certiorari.⁹⁸ Specifically, the court wanted to address the court of appeals’s holding regarding the admissibility of nonscientific expert testimony.⁹⁹ Although the court eventually affirmed the defendant’s conviction, it rejected the court of appeals’s reasoning regarding nonscientific expert testimony.¹⁰⁰ Specifically, the court held that “[a]ll expert testimony must satisfy the Rule 702 criteria, and that includes the trial court’s gatekeeping function in ensuring the proposed expert testimony meets a reliability threshold for the jury’s ultimate consideration.”¹⁰¹ Quoting *Kumho*, the court concluded that Rule 702 of the South Carolina Rules of Evidence makes “no relevant distinction between scientific knowledge and technical or other specialized knowledge.”¹⁰² Furthermore, the court stressed the importance of reliability of expert witness testimony, noting that the state’s “jurisprudence is in complete accord.”¹⁰³

92. *White I*, 372 S.C. at 371, 642 S.E.2d at 610.

93. *Id.*

94. *Id.* at 369, 642 S.E.2d at 609.

95. *Id.* at 376, 642 S.E.2d at 613 (alteration in original) (citing *State v. Morgan*, 326 S.C. 503, 513, 485 S.E.2d 112, 118 (Ct. App. 1997), *overruled by White II*, 382 S.C. at 273, 676 S.E.2d at 688).

96. *Id.* (citing *Morgan*, 326 S.C. at 513, 485 S.E.2d at 118).

97. *Id.* at 387, 642 S.E.2d at 619 (citing *State v. Jones*, 273 S.C. 723, 259 S.E.2d 120 (1979)).

98. *White II*, 382 S.C. at 267, 676 S.E.2d at 685.

99. *Id.* at 269, 676 S.E.2d at 686 (“Because of the suggestion that an initial determination of reliability is not part of the trial court’s gatekeeping role, we granted *White*’s petition for a writ of certiorari.”).

100. *Id.* at 270, 676 S.E.2d at 686. The supreme court held that “the trial court properly discharged its duty in this case.” *Id.* at 271, 676 S.E.2d at 687.

101. *Id.* at 270, 676 S.E.2d at 686.

102. *Id.* (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999)) (internal quotation marks omitted).

103. *Id.* (citing *State v. Jones*, 343 S.C. 562, 572, 541 S.E.2d 813, 818 (2001); *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999)).

As part of its reasoning, the court deemed it necessary to “clarif[y] . . . the analytical framework for the admissibility of nonscientific expert testimony.”¹⁰⁴ Specifically, the court reinforced the gatekeeping role of trial judges in determining the admissibility of expert testimony,¹⁰⁵ rejected the reasoning of the court of appeals in *White I*,¹⁰⁶ and overruled *State v. Morgan*,¹⁰⁷ a case upon which the court of appeals in *White I* relied, to the extent that *Morgan* suggested that nonscientific expert testimony did not fall within the *Jones* framework.¹⁰⁸ The court emphasized that “[t]he familiar tenet of evidence law that a continuing challenge to evidence goes to ‘weight, not admissibility’ has never been intended to supplant the gatekeeping role of the trial court in the first instance in assessing the admissibility of expert testimony, including the threshold determination of reliability.”¹⁰⁹ Thus, the court concluded that “the trial court in the discharge of its gatekeeping role in determining admissibility must initially answer the always present threshold question[] of . . . reliability.”¹¹⁰

V. THE EFFECTS AND SHORTCOMINGS OF *WHITE II*

A. *An Emphasis on the Gatekeeping Function of Trial Judges*

The court’s decision in *White II* is important and beneficial to the legal community in South Carolina because it explicitly emphasizes the gatekeeping function of the trial judge to determine the admissibility of all expert witness testimony, including scientific and nonscientific expert testimony. This brings the law in South Carolina regarding the admissibility of expert testimony in line with the federal rule to the extent that the federal rule mandates that a trial judge perform a gatekeeping function to prevent unreliable expert testimony from reaching the jury.¹¹¹ Although the *Jones* factors are supposed to help prevent “junk science” from entering the courtroom, before *White II* courts did not always apply the factors.¹¹² Thus, at the very least, the decision in *White II* forces South Carolina trial judges to perform their duties as gatekeepers to prevent all unreliable expert testimony, both scientific and nonscientific, from reaching the jury. Moreover, the decision should serve as a caution to litigants in South

104. *Id.* at 272, 676 S.E.2d at 687–88.

105. *See id.* at 274, 676 S.E.2d at 688.

106. *Id.* at 270, 676 S.E.2d at 686.

107. 326 S.C. 503, 485 S.E.2d 112 (Ct. App. 1997), *overruled by White II*, 382 S.C. at 273, 676 S.E.2d at 688.

108. *White II*, 382 S.C. at 273, 676 S.E.2d at 688. In a footnote, the court in *White II* explained the fallacy of the reasoning in *Morgan*. *See id.* at 273 n.6, 676 S.E.2d at 688 n.6.

109. *Id.* at 273, 676 S.E.2d at 688.

110. *Id.* at 274, 676 S.E.2d at 688–89.

111. *See, e.g., Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) (emphasizing the importance of the trial judge’s role as a gatekeeper even if it means preventing “the jury from learning . . . authentic insights and innovations”).

112. *See supra* text accompanying notes 75–80.

Carolina courts to ensure that their experts' opinions are well-founded and reliable.

B. Shortcomings of White II and Proposed Amendments to the Rules

Even though the court's decision in *White II* emphasizes the gatekeeping role of the trial judge, the decision comes up short.¹¹³ That is, there are still important revisions that should be implemented to ensure that expert witness testimony in South Carolina courts is reliable. Specifically, the South Carolina Supreme Court should promulgate certain amendments (Amendments), originally proposed in 2008, to the state rules of evidence and civil procedure that explicitly adopt the *Daubert* standard for admissibility of expert testimony.¹¹⁴ Such Amendments would make South Carolina Rule 702 identical

113. Cf. S.C. Judicial Dep't, Written Comments Submitted by the Public, <http://www.judicial.state.sc.us/whatsnew/ruleChanges/publicComments.pdf> (last visited May 16, 2010) (comment of Daniel B. White) ("South Carolina's current expert admissibility standard in many cases is in fact no standard at all, but rather a license for most expert testimony to be admitted 'for what it's worth.'").

114. See S.C. R. EVID. 702 (proposed 2008) ("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."), available at <http://www.judicial.state.sc.us/whatsnew/20080320publicHearingNotice.htm>; S.C. R. CIV. P. 16(d), 26(b)(4)(C) (proposed 2008), available at <http://www.judicial.state.sc.us/whatsnew/20080320publicHearingNotice.htm>. As of February 2010, the South Carolina Supreme Court has yet to promulgate these Amendments, which are not the first efforts to adopt *Daubert* in South Carolina. In 2007, the General Assembly considered legislation that would have had the same effect as adopting the *Daubert* standard. See S. 687, 117th Gen. Assem., Reg. Sess. (S.C. 2007). However, such an approach would have been both problematic and controversial. It is the prerogative of the South Carolina Supreme Court to promulgate rules of evidence and procedure. See S.C. CONST. art. V, § 4A; 19 S.C. JUR. *Constitutional Law* § 21 (1993) ("[R]ules [of the court] are submitted by the supreme court to the judiciary committees of the House of Representatives and the Senate; the rules automatically go into effect unless specifically rejected by a joint resolution."). Had the General Assembly passed a law that purportedly contravenes the South Carolina Rules of Evidence or Procedure, the state supreme court could reject the applicability or validity of the legislation. There are a few examples where the General Assembly has acted beyond the scope of its power and the South Carolina Supreme Court has acted in response. For instance, South Carolina law defines the "practice of engineering" to include "expert technical testimony," S.C. CODE ANN. § 40-22-20(23) (Supp. 2009), and it also prohibits the practice of engineering without a South Carolina license, *id.* § 40-22-30(A)(1). However, the South Carolina Supreme Court rejected a plain interpretation of the statute because it is in contravention of Rule 702 of the South Carolina Rules of Evidence. *Baggerly v. CSX Transp., Inc.*, 370 S.C. 362, 374–75, 635 S.E.2d 97, 104 (2006) (permitting an engineer to testify as an expert in her field, pursuant to Rule 702, even though the expert was not licensed in South Carolina). Although the court did not expressly invalidate the statute, it essentially ignores the plain meaning of the statute because it conflicted with Rule 702. See *id.* But see *Stokes v. Denmark Emergency Med. Servs.*, 315 S.C. 263, 267, 433 S.E.2d 850, 852 (1993) (noting the South Carolina Constitution's "intent to subordinate to the General Assembly the Court's rulemaking power in regard to practice and procedure").

to Federal Rule 702.¹¹⁵ Significantly, the notes to the Amendments include a provision explicitly incorporating the comments of Federal Rule 702.¹¹⁶ This provision would have the effect of adopting *Daubert*'s progeny: *Kumho*, *Joiner*, and *Weisgram*.¹¹⁷ Furthermore, the Amendments would add a provision to the state's rules of civil procedure for holding pretrial *Daubert* conferences,¹¹⁸ as well as a provision requiring litigants to submit a *Daubert* report to opposing counsel and the court.¹¹⁹

One positive effect that would be gained from the Amendments that was not achieved by *White II* is the express adoption of *Daubert* and its progeny.¹²⁰ Under the Amendments, these cases would have precedential value in South Carolina state courts. Moreover, the proposed Amendments would also make other federal courts' opinions interpreting the *Daubert* standard persuasive authority in South Carolina courts.¹²¹ While this would not have any binding precedential effect, state trial courts could rely heavily on federal authority as they shape South Carolina's interpretation of the *Daubert* standard. This could have a significant practical effect on South Carolina trial attorneys because the Amendments would open up a significant body of case law for litigants to apply in state courts. For instance, the Fourth Circuit has held that "[t]he court need not

115. S.C. R. EVID. 702 note (proposed 2008).

116. *Id.* ("The comments to the 2000 amendment to the federal rule are incorporated herein by reference.").

117. The comments to Federal Rule 702 indicate that *Daubert*'s progeny is correct and should be followed. See FED. R. EVID. 702 advisory committee's note (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993)) (noting that Federal Rule 702 was amended in response to *Daubert* and cases interpreting it).

118. S.C. R. CIV. P. 16(d) (proposed 2008) ("Upon motion of a party, the court shall hold a pretrial hearing to determine whether a witness qualifies as an expert and whether the expert's testimony satisfies the requirements of Rule[] 702 . . .").

119. S.C. R. CIV. P. 26(b)(4)(C) (proposed 2008) ("Whether or not a party elects to request a pretrial hearing as contemplated in Rule 16(d), all parties shall disclose to other parties to the litigation the identity of all persons who may be used at trial to present expert evidence. Except as otherwise stipulated or directed by the court, this disclosure, with respect to a witness who is retained to provide expert testimony at trial in the case . . . must be accompanied by a written report prepared and signed by the witness or by counsel for the party retaining that expert."). Opinion on these Amendments to the state rules of civil procedure is mixed, and advocates on both sides of the debate have strong arguments for their respective positions. Compare S.C. Judicial Dep't, *supra* note 113 (comment of R. Bruce Shaw) (arguing that the proposed Amendments are important to prevent "trial by ambush" and "will clarify the limits on expert testimony in the event of a trial"), and *id.* (comment of Edward W. Laney, IV) (arguing that the proposed Amendments will lead to greater judicial economy and assist litigants to understand expert opinions), with *id.* (comment of William H. Ehliens, II) (arguing that the proposed Amendments will create an "insurmountable hurdle" for certain litigants), and *id.* (comment of Joseph F. Rice) (arguing that the proposed Amendments will simply make litigation "more time-consuming, delayed, and more expensive").

120. See *supra* notes 114–15 and accompanying text.

121. When construing rules of procedure that mirror the federal rules, South Carolina state courts should look to federal case law as persuasive authority, particularly in instances where there are no South Carolina state cases directly on point. See *Gardner v. Newsome Chevrolet-Buick, Inc.*, 304 S.C. 328, 330, 404 S.E.2d 200, 201 (1991).

determine that the proffered expert testimony is irrefutable or certainly correct.”¹²² Like the United States Supreme Court, the Fourth Circuit has also noted that “[a]s the gatekeeper, the district court should analyze the proposed expert testimony using several factors”¹²³ and that the “factors identified in *Daubert* ‘do not constitute a definitive checklist or test.’”¹²⁴ Finally, in some rare instances, certain kinds of expert testimony can become so reliable that it can be admitted subject to judicial notice.¹²⁵

South Carolina district court decisions on *Daubert* rulings would also provide insight on facts and circumstances that are important in determining the admissibility of an expert. For instance, in *Trademark Properties, Inc. v. A & E Television Networks*,¹²⁶ the district court judge ruled that an expert’s methodology was unreliable and failed to satisfy any of the *Daubert* factors because the expert relied solely on a *New York Times* chart and the Internet to calculate the plaintiff’s claim for damages.¹²⁷ In *Morehouse v. Louisville Ladder Group LLC*,¹²⁸ the judge excluded an expert’s testimony as unreliable because he did not employ the scientific method in his methodology and because the scientific community did not generally accept his hypothesis.¹²⁹ The judge found that the expert did not “reliably test[] his hypothesis” because the expert was unable to state conclusively whether the ladder was altered before the plaintiff was injured.¹³⁰ Furthermore, the judge found that the expert’s hypothesis for why the ladder caused the plaintiff’s injury was “not even known” to the scientific community and thus not generally accepted.¹³¹ Thus, should the court adopt the proposed Amendments, practioners in South Carolina state courts must familiarize themselves with the federal courts’ applications of *Daubert* because, if nothing else, they will provide a wide factual basis to compare to a new case.

The proposed Amendments also provide a practical benefit not achieved by the decision in *White II*. As mentioned previously, the Amendments include a

122. *United States v. Moreland*, 437 F.3d 424, 431 (4th Cir. 2006).

123. *Anderson v. Westinghouse Savannah River Co.*, 406 F.3d 248, 261 (4th Cir. 2005) (citing *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–94 (1993)).

124. *Simo v. Mitsubishi Motors N. Am., Inc.*, 245 F. App’x 295, 301 (4th Cir. 2007) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150 (1999)).

125. *United States v. Crisp*, 324 F.3d 261, 268 (4th Cir. 2003) (citing *Daubert*, 509 U.S. at 592 n.11). Because South Carolina has an evidentiary rule allowing for judicial notice, this line of *Daubert*, as interpreted by the Fourth Circuit in *Crisp*, would also apply. *See* S.C. R. EVID. 201.

126. No. 2:06-CV-2195-CWH, 2008 WL 4811461 (D.S.C. Oct. 28, 2008).

127. *Id.* at *2. The trial judge was also skeptical of the expert’s use of the Internet to attain the information. *Id.* n.2.

128. No. 3:03-887-22, 2004 WL 2431796 (D.S.C. June 28, 2004). The plaintiff’s expert intended to testify that a defective ladder that did not have enough overall strength caused the plaintiff’s injury. *Id.* at *2.

129. *Id.* at *5–7.

130. *Id.* at *5.

131. *Id.* at *7 (internal quotation marks omitted). The expert had proffered a theory of “spontaneous buckling” that purportedly caused the ladder to collapse and caused the plaintiff’s injury. *Id.* at *6.

provision for holding pretrial *Daubert* conferences and a provision requiring litigants to submit a *Daubert* report to opposing counsel and to the court.¹³² These changes to the South Carolina Rules of Civil Procedure would provide practical benefits to practioners in state courts. First, the pretrial *Daubert* conference would facilitate the trial judge's ability to make a ruling on the admissibility of an expert witness before the trial begins. Second, upon making a decision regarding the admissibility of an expert witness at a pretrial *Daubert* conference, the trial court in its ruling would be required to "set forth the findings of fact and conclusions of law upon which the ruling to admit or exclude expert evidence is based."¹³³ These written rulings would provide insight and predictability regarding future trial court decisions on the admissibility of expert witnesses. Third, the provision requiring litigants to submit a *Daubert* report to opposing counsel and the court¹³⁴ would serve to educate all parties and the court on the nature of an expert's testimony.¹³⁵ This would assist both sides of the litigation and would also even the playing field by requiring disclosure of the subject matter of the export's testimony,¹³⁶ thus preventing "trial by ambush."¹³⁷

VI. CONCLUSION

The South Carolina Supreme Court in *White II* has clarified the law regarding the admissibility of expert witness testimony—that *all* expert witness

132. See *supra* notes 114–19 and accompanying text.

133. S.C. R. Civ. P. 16(d) (proposed 2008).

134. S.C. R. Civ. P. 26(b)(4)(C) (proposed 2008).

135. See S.C. Judicial Dep't, *supra* note 113 (comment of Edward W. Laney, IV) (arguing that the proposed Amendments will lead to greater judicial economy and assist litigants to understand expert opinions); *id.* (comment of Daniel B. White) ("The adoption of [the proposed Amendments] would offer trial judges greater guidance and clearly establish the judge's role as a gate-keeper in ruling on the admissibility of proffered expert testimony.").

136. See S.C. R. Civ. P. 26(b)(4)(C) (proposed 2008); S.C. Judicial Dep't, *supra* note 113 (comment of Thomas E. Dudley, III) (arguing that the *Daubert* report provision would "level[] the playing field and reduce[] the game playing").

137. S.C. Judicial Dep't, *supra* note 113 (comment of R. Bruce Shaw) (arguing that the proposed Amendments are important to prevent "trial by ambush" and "will clarify the limits on expert testimony in the event of a trial"). Opponents of the proposed Amendments argue that the jury should ultimately decide the worthiness of expert testimony. See, e.g., *id.* (comment 1 of the South Carolina Bar Practice and Procedure Committee) (arguing that the proposed Amendments "take away from the province of the jury the ability to hear [expert] testimony and use their judgment to weigh the evidence and creditability of this evidence"); *id.* (comment of Frederick I. Hall, III) ("[V]igorous cross-examination and motions to exclude expert testimony based upon its unreliability are the most appropriate ways to deal with an expert whose testimony may be suspect."). However, these arguments run contrary to the fundamental premise of *Daubert* that a jury should not even hear evidence if it is unreliable. See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–93 (1993) (emphasizing that the determination of reliability of an expert's testimony is a "preliminary assessment"); S.C. Judicial Dep't, *supra* note 113 (comment of R. Bruce Shaw) (arguing that cross-examination is "not an adequate substitute for an experienced trial judge to determine the boundaries and . . . admissibility of expert evidence").

testimony, both scientific and nonscientific, is subject to rigorous scrutiny to ensure that such testimony is reliable pursuant to Rule 702 of the South Carolina Rules of Evidence. Moreover, it emphasized the gatekeeping role of the trial judge to assess the reliability of an expert witness's testimony. However, the court should do more to ensure that trial courts can properly fulfill their gatekeeping duties. To that extent, the South Carolina Supreme Court should adopt the proposed Amendments, which would amend the South Carolina Rules of Evidence and the South Carolina Rules of Civil Procedure and bring South Carolina state practice in line with federal practice. Such Amendments would open up a rich body of case law that could be used as authority in state courts. Moreover, the procedural mechanisms would ensure that all parties and the court are fully abreast to the testimony of an expert witness. By providing procedural mechanisms through which all parties and the court can become fully aware of an expert witness's testimony before trial, the Amendments would serve to increase fairness and predictability in South Carolina state court practice.

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