by James D. Gassenheimer

Are Judges In The Eleventh Circuit Seizing More Control?

Federal Rule of Evidence 702 governs the admission of expert testimony in federal court, and specifically provides 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 facts of the case.

In *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993) and *Kumho Tire Co. Ltd. v. Carmichael*, 526 U.S. 137 (1999), the Supreme Court articulated the framework and principles upon which lower federal courts should apply this rule. These landmark decisions have become synonymous with the inquiry that federal courts employ to evaluate, and ultimately choose whether to admit or exclude, expert testimony.

The *Daubert* inquiry focuses on the second prong of the Rule 702 analysis, namely, whether or not an expert's testimony is sufficiently reliable to justify its admission into evidence. In essence, *Daubert* requires the trial court to act as a "gatekeeper" to ensure that speculative and unreliable opinions do not reach the jury; as gatekeeper, the court must perform "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *McClain v. Metabolife Int'l Inc.*, 401 F.3d 1233, 1237 (11th Cir. 2005) (citing *Daubert*, at 593-94). Under *Daubert*, a court may evaluate the reliability of an expert's methodology using a number of factors, including: (1) whether the expert's theory can be and has been tested; (2) whether the theory has been subjected to peer review and publication; (3) the known or potential rate of error of the particular scientific technique; and (4) whether the technique is generally accepted in the scientific community. *Daubert*, 509 U.S. at 593–94.

Citing *Kumho*, the Eleventh Circuit has noted that a district court enjoys "considerable leeway in making reliability determinations under *Daubert*," and that a district court's determination will only be disturbed if the court has abused its discretion. *Id.* at 1238. The scope of discretion afforded to district courts in serving as gatekeepers and conducting a *Daubert* inquiry continues to increase under Eleventh Circuit precedent and appears to be broader than in most sister circuits. Recent jurisprudence (*e.g., Kilpatrick v. Breg, Inc.*, 613 F.3d 1329 (11th Cir. 2010) *aff'g* 2009 WL 2058384 (S.D. Fla. Jun. 25, 2009)) suggests that the Eleventh Circuit has adopted an extremely broad view of the judge's role as gatekeeper with respect to exclusion of expert testimony—a fact that has already been noted by several district courts in other circuits. This article looks at the wider evidentiary implications of the *Kilpatrick* holding, and whether, under Eleventh Circuit law, the roles of gatekeeper and fact-finder are being blurred.

The Kilpatrick Holding

The Eleventh Circuit's holding in *Kilpatrick v. Breg Inc.*, 613 F.3d 1329 (11th Cir. 2010) *aff'g* 2009 WL 2058384 (S.D. Fla. Jun. 25, 2009) is notable because it appears to signal a paradigmatic shift in the law. It alters the court's role in the *Daubert* inquiry, and greatly broadens the scope of the court's power to act as gatekeeper with respect to expert testimony. In *Kilpatrick*, the Eleventh Circuit affirmed the trial court's exclusion of the plaintiff's expert testimony, resulting in summary judgment for the defendant. The plaintiff, Kilpatrick, had sued the defendant, Breg, Inc., on theories of negligence and products liability in connection with a pain pump manufactured by Breg for use during and after surgery. Kilpatrick claimed to have been injured by one of Breg's pumps, and proffered Gary Poehling, M.D., as his expert witness on causation. The district court determined that Dr. Poehling used an unreliable methodology to reach his conclusions, rendering his testimony inadmissible under Rule 702 and *Daubert*. The district court further determined that, without Dr. Poehling's testimony, Kilpatrick could not establish the causation element in any of his claims, and final summary judgment

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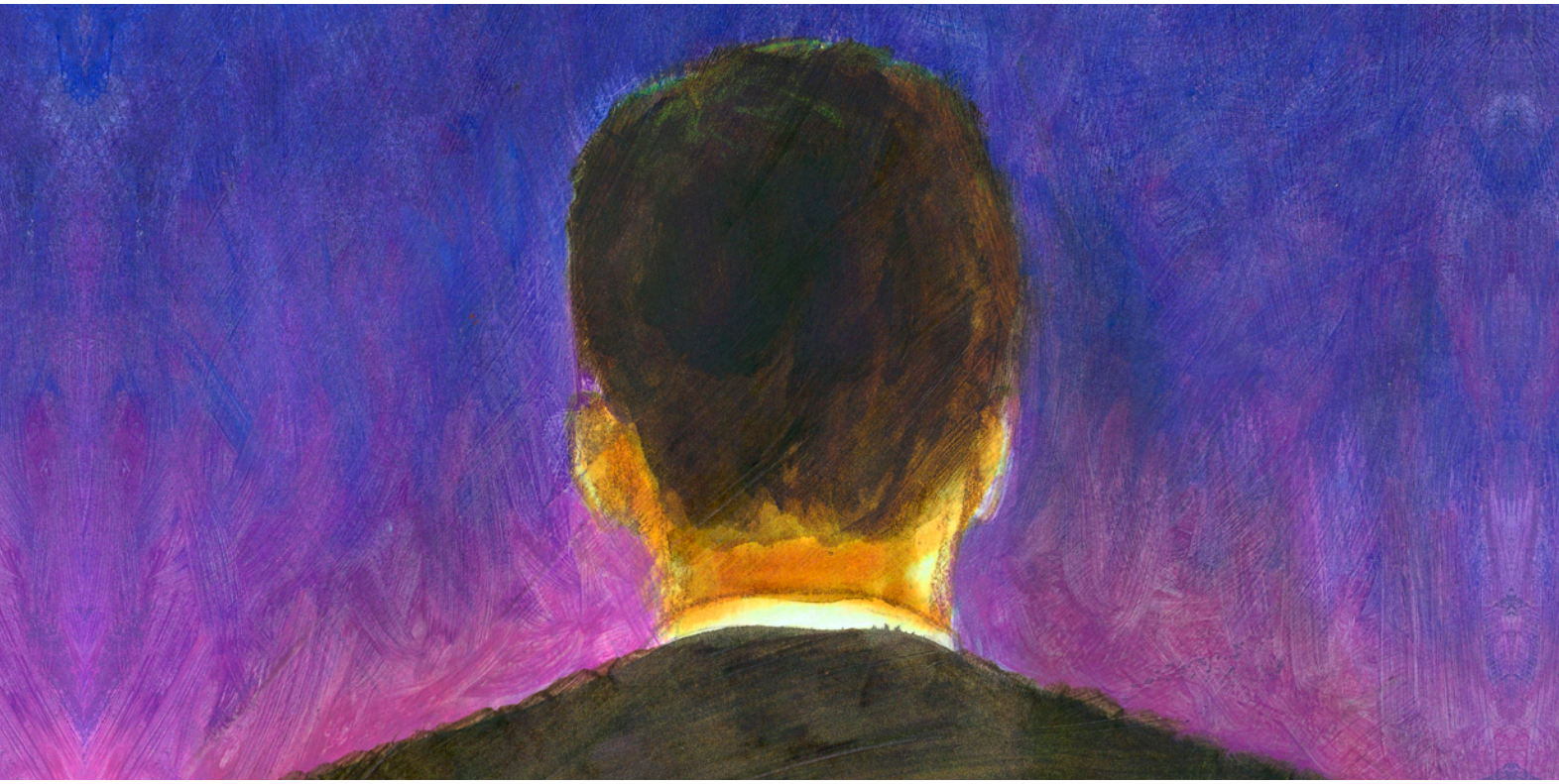
was granted in favor of Breg.

In *Kilpatrick*, the district judge had conducted an in-depth examination of each piece of evidence relied upon by Dr. Poehling—generally, a series of published and widely accepted medical studies on the impact of shoulder pumps on the type of injury Kilpatrick suffered. In his analysis, Judge Moore noted that none of the publications offered "an ultimate conclusion as to the general causation of glenohumeral chondrolysis. At best, some of them tend to show an association between chondrolysis and intra-articular pain pump use ..." 2009 WL 2058384, at *5 (citations omitted). In essence, Judge Moore disagreed with the analysis and conclusions



of the Plaintiff's expert. Based on the fact that the articles did not offer a specific conclusion, and the fact that Dr. Poehling had not conducted independent research, the district court excluded Dr. Poehling's testimony. The district court thus concluded that Dr. Poehling's analysis of the studies could not support his conclusions that Breg's shoulder pumps could have caused Kilpatrick's shoulder injury.

On appeal, Kilpatrick contended that the district court went well beyond its role as gatekeeper under *Daubert* in excluding Dr. Poehling's expert testimony. He argued that the court did not merely examine whether the methodology itself was scientifically valid (in this case, a methodology known as "differential diagnosis"), but instead the court improperly usurped the role of fact-finder by conducting an in-depth analysis of Dr. Poehling's *application* of that methodology and the *conclusions* he reached. Kilpatrick argued that the district court should have focused solely on whether Dr. Poehling was qualified to testify as an expert and whether he would provide testimony that could assist the jury.

The Eleventh Circuit, in its controversial decision, rejected Kilpatrick's argument and affirmed the exclusion of the testimony. The Eleventh Circuit also affirmed the analytical approach taken by the district court in its *Daubert* inquiry, and expressly noted that the approach advocated by Kilpatrick "goes against the law of this Circuit, which has reversed trial courts who abdicate their gatekeeper role and refuse to assess reliability." *Kilpatrick*, 613 F.3d at 1336 (citing *McClain*, 401 F.3d at 1238). In so holding, the Eleventh Circuit reasoned as follows:

> The district court conducted an exhaustive and thorough review of the evidence Kilpatrick submitted to support causation, and concluded that his expert witness did not employ a reliable methodology to support his conclusions. This court has carefully reviewed the same evidence and finds that the district court did not abuse its broad judicial discretion in so holding. **We are aware that courts in other circuits have taken a more expansive approach and permitted expert testimony in similar situations** … The law of this Circuit is clear that the district courts are given broad discretion with wide latitude in conducting a *Daubert* analysis and concluding that methodologies based on speculative literature and temporal proximity analysis such as the type relied upon by Dr. Poehling are not sufficient to pass *Daubert* review.

Kilpatrick, 613 F.3d at 1343 (emphasis added). What is truly noteworthy is that the Eleventh Circuit seems to acknowledge that the district court's approach goes well beyond the typical gatekeeping function of the court in assessing the reliability of expert testimony under *Daubert*, as that function has been defined by its sister circuits. And yet, the Eleventh Circuit wholeheartedly endorses that approach.

Although no other Circuit has yet had occasion to opine on the *Kilpatrick* decision, not surprisingly, several district courts from outside the Eleventh Circuit have been critical.

Does Kilpatrick Go Too Far?

Federal district courts have criticized the appellate and trial court opinions in the *Kilpatrick* case, expressing the view that the *Kilpatrick* decisions went "far beyond [the court's] gatekeeping function and 'failed to distinguish between the threshold question of admissibility of expert testimony and the persuasive weight to be accorded such testimony by a jury.'" *McClellan v. I-Flow Corp.*, 710 F. Supp. 2d 1092, 1106 (D. Or. 2010); *see also*; *Monroe v. Zimmer U.S. Inc.*, 766 F. Supp. 2d 1012, 1020-21, 1027 (E.D. Cal. 2011); *Schott v. I-Flow Corp.*, 696 F. Supp. 2d 898, 905 (S.D. Ohio 2010). Each decision noted that, under *Daubert,* it was not proper for the *Kilpatrick* court to focus on the correctness of the applications of, or conclusions yielded by, the expert's methodology. Instead, "the proper focus under *Daubert* is whether an expert's testimony rests on evidence reliably derived from scientific methodology and is relevant to the facts of the case, *not whether plaintiffs' experts can prove the point of their testimony*." *Woodard v. Stryker Corp.*, 2012 WL 3475079, at *7 (D. Wyo. July 16, 2012) (denying motion to exclude expert testimony, in part); *see also Monroe*, 766 F. Supp. 2d at 1020-21 ("In evaluating the expert's testimony, the court must focus on the principles or methodology involved, not the conclusions that they generate."); *McClellan*, 710 F. Supp. 2d at 1106 ("Importantly, it is not the court's role to decide whether the proffered expert testimony sufficiently proves that continuous infusion can cause chondrolysis; rather, it is the court's duty to ensure that the proffered expert testimony is sufficiently reliable to be admitted at trial for consideration by the trier of fact."). "Ultimately, the court must 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, such that the expert's work product amounts to good science." *Monroe*, 766 F. Supp. 2d at 1020-21 (denying motion to exclude evidence because doing so would bring the court far outside its "gatekeeper" role).

Denying defendants' motion to exclude expert testimony, the court in *McClellan v. I-Flow Corp.* was especially critical, stating that it remained "unpersuaded by defendants' reliance on *Kilpatrick*," and that the decision violated the precepts of *Daubert* and Rule 702 itself. *McClellan*, 710 F. Supp. 2d at 1106.

Does Kilpatrick Move In The Right Direction?

The *Daubert* inquiry presents unique and challenging questions different from most other evidence issues. This results in part from the fact that expert witnesses are viewed with authority by juries. *Daubert* provided more tools to address this challenge.

Before *Daubert*, juries, irrespective of their comfort with complex scientific issues, played a large role in assessing the validity of scientific testimony. The lawyer and experts presented their side, and the opposing party cross-examined. The jury then decided which side had the stronger, more persuasive, arguments. Usually, judges did not exclude expert witnesses before cases went to trial, even when they considered the evidence to be presented by the witnesses somewhat weak. Judges usually let the cases go forward and allowed the juries to decide on the merits of the evidence.

Daubert addressed the issue that assessing scientific evidence is incredibly complicated. It implicitly acknowledged that trial judges are often in a better position to judge science. Judges more often than not have more experience with adversarial presentations and are better able to sift through different levels of advocacy and objectively measure the evidence. Judges have the ability to conduct independent research. As such, the *Kilpatrick* decision may reflect the intent of *Daubert* that judges are to weigh the standards that scientists use to determine the reliability of the proferred analysis for consideration by a jury. *Kumho Tire* teaches that scientists are to bring to the courtroom the same level of intellectual rigor that characterizes the practice of an expert in their field. In that respect, *Kilpatrick* may be consistent with the intent of *Daubert* nothwithstanding its controversial analysis.

Conclusion

As the decisions critical of *Kilpatrick* make clear, the case could have longstanding and widely felt repercussions in the Eleventh Circuit and beyond. The thrust of the Supreme Court's rulings in *Daubert* and *Kumho* is that the judge must serve as a gatekeeper to assess the reliability of expert testimony, so that the jury, comprised of lay citizens, is presented with good science and not fooled simply by the lofty credentials of compensated experts. However, in conducting its inquiry, the court is limited to acting as gatekeeper, and should not usurp the role of fact-finder from the jury by excluding testimony which would otherwise be helpful to the jury in its factual determinations.

By disallowing Dr. Poehling's testimony, the *Kilpatrick* court arguably went beyond its proper role as mere gatekeeper under *Daubert* and *Kumho*. The *Kilpatrick* court disallowed expert testimony which was based on accepted scientific methodology simply because the court disagreed with the expert's application of certain principles, and therefore questioned the validity of the expert's conclusions. Before *Kilpatrick*, such an evaluation was firmly in the province of the jury and not the judge.

As no sister circuit has yet to opine on the *Kilpatrick* decision, its ramifications remain unclear. It is possible that *Kilpatrick* will be a limited holding, especially as several district courts have criticized the decision in the context of lawsuits concerning the malfunctions of surgical pain pumps. In fact, all of the critical decisions rejected the *Kilpatrick* court's assessment of certain *specific* scientific studies and other evidence. However, *Kilpatrick* could broaden the scope of the court's gatekeeping role significantly with respect to the admissibility of expert testimony, allowing a court to strike expert testimony simply if that court disagrees with an expert's conclusions or methodological application. Under the guise of gatekeeper, the court could improperly step far beyond its traditional role and become a second fact-finder with respect to an expert's reliability.

As the jurisprudence in this area continues to evolve, what is certain for now is that the wider effect of the *Kilpatrick* decision provides judges in the Eleventh Circuit and beyond with a tool to make it tougher to admit expert opinions into evidence. ⊙