

AN UPDATE ON GEORGIA’S EXPERT QUALIFICATION STATUTE
O.C.G.A. § 24-9-67.1

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1. INTRODUCTION - STATUTE AND STATISTICS:

- The revised code section became effective February 16, 2005 as part of Georgia's major tort reform.
- Nine Supreme Court cases have cited the statute since May 2006.
- Thirty-Nine Court of Appeals cases cited the statute since enactment and twelve Court of Appeals cases have cited the statute this year.

§ 24-9-67.1. Expert opinion testimony in civil actions; medical experts; pretrial hearings; precedential value of federal law

(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.¹

(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 ~~which are or will be admitted into evidence at the hearing or trial;~~²

(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 Shaded portion is modeled after Fed. R. Evid. 702 and 703.

² The Supreme Court approved the striking this portion of section (b)(1) from the statute because it contradicts portions of section (a). See *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 275 (2008); Part 2.B infra.

(1) Was licensed by an appropriate regulatory agency to practice his or her profession in the state in 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;³

(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 therapists, 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 that health care provider. However, a nurse, nurse practitioner, certified registered nurse anesthetist, nurse midwife, physician's assistant, physical therapist,

³ Legislature's use of the word "or" between subparagraphs (2) (A) and (2) (B), followed by its use of the word "and" between subparagraphs (2) (B) and (2) (C), indicates that a medical expert must show either "active practice" or "teaching" for "at least three of the last five years," but that whichever of these may be the case, the expert must also be "a member of the same profession" as the person whose performance he is evaluating. *Smith v. Harris*, 294 Ga. App. 333 (2008) (pharmacist may not testify as to the standard of care applicable to a physician). Notably, it was error to have a second SOC expert, who was a pharmacist, testify against a physician. Overzealousness may lead to insertion of error.

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.

2. CONSTITUTIONALITY

A. COURT MAY APPLY FEDERAL LAW:

The suggestion in subsection (f) of the statute that Georgia court “may” consider the decisions of other courts on the subject does not invade the province of the judiciary because it is not couched in mandatory terms and merely stated a principle of law regularly employed by Georgia courts. *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 276 (2008). Further, the statement of intent in subsection (f) is not a delegation of legislative power. *Id.* See also *Condra v. Atlanta Orthopaedic Group, P.C.*, 285 Ga. 667, 671 (2009).

B. ADMISSIBILITY OF UNDERLYING FACTS

Subsection (a) and subsection (b)(1) of the statute are contradictory. “Specifically, subsection (b)(1) limits experts to relying on potentially admissible facts and data, whereas subsection (a) plainly states that facts and data relied upon need not be admissible. The two provisions cannot be harmonized and, read together, they render the statute unconstitutionally vague.” The Supreme Court thus approved the striking of section (b)(1) from the statute. *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 275 (2008).

C. DIFFERENT STANDARD FOR CRIMINAL CASES

In criminal actions and probation revocation proceedings, apply *Harper v. State*, 249 Ga. 519 (1982). See *Carlson v. State*, 280 Ga. App. 595, 596 (2006).

Mason v. Home Depot U.S.A., Inc., 283 Ga. 271 (2008), rejected an equal protection challenge since the plaintiffs failed to show that they were similarly situated to a defendant in a criminal action as parties to civil cases are not similarly situated to those engaged in criminal prosecutions.

3. RETROACTIVE APPLICATION

“The presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the courts, even where the alteration which the statutes make has been disadvantageous to one of the parties.” *Pritchard v. Savannah St. & R. R. Co.*, 87 Ga. 294, 299 (1891). “Where a statute governs only procedure of the courts, including the rules of evidence, it is to be given retroactive effect absent an expressed contrary intention.” *Polito v. Holland*, 258 Ga. 54 (1988). Further, “there are no vested rights in any course of procedure.” *Foster v. Bowen*, 253 Ga. 33 (1984).

“[L]aws that affect substantive rights may operate prospectively only. Substantive law is that law which creates rights, duties, and obligations.” *Nathans v. Diamond*, 282 Ga. 804, 809 (2007). O.C.G.A. § 24-9-67.1(c) is applied retroactively because it does not affect a party's substantive right of action, as it does not change the standard of care to be applied or the measure of the party's recovery. *Nathans v. Diamond*, 282 Ga. 804, 809 (2007)

In *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 278 (2008), the plaintiffs sued Home Depot in 1997 for personal injuries in a product liability claim. The case went to trial in 2005 shortly after the Georgia General Assembly enacted the Tort Reform Act of 2005. At the first trial the defense filed a motion to exclude the testimony of two expert witnesses for the plaintiffs, but the trial court denied the motion. After a mistrial, the defense renewed their motion to exclude the testimony of the two experts. The trial court entered a second order applying the statute to exclude the testimony of the two experts at the second trial, which decision was upheld by the Supreme Court.

4. TIMING OF MOTION TO EXCLUDE EXPERT (different from federal court)

O.C.G.A. § 24-9-67.1 expressly provides that: “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. O.C.G.A. § 24-9-67.1 (d).

In *Ford Motor Co. v. Gibson*, 283 Ga. 398, 404 (2008) and *Bailey v. Edmundson*, 280 Ga. 528, 533 (2006) the parties requested hearings to determine whether expert testimony would satisfy the requirements of O.C.G.A. § 24-9-67.1, after the pretrial conference -- “[t]he trial court correctly denied that request, since such a hearing and the ruling thereon shall be completed no later than the final pretrial conference contemplated under O.C.G.A. § 9-11-16.”

***But see Hawkins v. OB-GYN Assocs., P.A.*, 290 Ga. App. 892, 895 (2008) (Defendant’s objections to expert’s testimony at the time of his videotaped deposition were reserved until trial, thus court considered and granted motion at trial to exclude deposition testimony because it was speculative and based upon insufficient information).**

5. STANDARD OF CARE EXPERTS IN MEDICAL MALPRACTICE CASES

Georgia’s new statute mandates a drastic change by establishing minimum objective criteria related to the education, skill, or experience required for an expert to testify as to the standard of care applicable to physicians. Section 24-9-67.1(c) requires an expert witness to have been licensed in Georgia and practicing or teaching “in the area of practice or specialty in which the opinion is to be given” for at least three of the five years preceding the alleged medical negligence. Furthermore, the expert must have worked or taught in the area of practice or specialty “with sufficient frequency to establish an appropriate level of knowledge, as determine by the judge, in performing the procedure, diagnosing the condition, or rendering the treatment which is alleged to have been performed or rendered negligently.” O.C.G.A. § 24-9-67.1(c)(2)(A).

The requirement that the expert have “actual professional knowledge and experience in the area of practice or specialty in which the opinion is to be given” means that the plaintiff’s expert does not have to have knowledge and experience in the “same area of practice/specialty as the defendant doctor.” Instead, the issue is whether the expert has knowledge and experience in the practice or specialty that is relevant to the acts or omissions that the plaintiff alleges constitute malpractice and caused the plaintiff’s injuries. *Nathans v. Diamond*, 282 Ga. 804, 806 (2007); *Cotten v. Phillips*, 280 Ga. App. 280, 284 (2006). [*Nathans* and *Cotten* both distinguished in *Houston v. Phoebe Putney Memorial Hospital, Inc.*, 295 Ga. App. 674, 678 (2009).]

The Georgia Supreme Court has recently accepted this restriction and narrowly construed the term “area of practice or specialty” to strictly limit the types of physicians who are qualified to testify in a given case. For example, in *Nathans*, an otolaryngologist allegedly failed to adequately inform the plaintiff of the potential risks and complications of a surgical procedure. **The Court held that the area of specialty “in which the opinion is to be given” concerns the type of otolaryngology surgery performed on the plaintiff and the risks associated with it. 282 Ga. at 806.** Applying this narrow definition, the court upheld the exclusion of an expert who had not performed surgeries like the one in question or obtained informed consents for similar surgeries. While he had consulted with surgeons such as otolaryngologists, he did not sufficiently demonstrate that the surgeries he had performed involved risks similar to those involved in the lawsuit. *Id.*

The Georgia Court of Appeals extended the limitations of § 24-9-67.1(c) even further by focusing on language requiring that the expert have practiced in the specialty “**with sufficient frequency to establish an appropriate level of knowledge**” in performing a procedure, diagnosis, or treatment at issue. *Spacht v. Troyer*, 288 Ga. App. 898, 902 (2007). In *Spacht* the defendant allegedly misdiagnosed a vascular ring. The court held that the proffered expert satisfied the “area of practice or specialty” requirement because he had “over thirty years of

experience in diagnosing and surgically managing children with vascular rings.” However, the court excluded his testimony because the expert did not indicate when he had last diagnosed a vascular ring. Thus, he could not demonstrate that he had an “appropriate level of knowledge” to testify as to the procedure at issue in the case (distinguished in *Houston v. Phoebe Putney Memorial Hospital, Inc.*, 295 Ga. App. 674 (2009)).

In *Dawson v. Leder*, 294 Ga. App. 717 (2008), the Court of Appeals similarly excluded a medical expert who proffered to testify as to a breach of the standard of care in providing post-operative care following a cervical spine surgery. The decedent had suffered a respiratory arrest while undergoing breathing treatments following the surgery, and the expert testified that the defendant failed to adequately communicate risks associated with the decedent's airway to the attending physician. **The Court deemed the area of practice or specialty to be “the area of post-surgical airway management.”** The trial court excluded Plaintiff's expert testimony on the ground that she was unqualified to render an opinion as to the standard of care applicable to the decedent's post-operative airway management. The expert (1) admitted that she had never managed the airway of a patient who had undergone a surgery similar to that which the decedent had undergone, (2) nor had she performed a similar surgical procedure, and (3) she testified that post-surgical airway maintenance is generally performed by anesthesiologists, an area in which she did not have anesthesiology training.

In *Akers v. Elsey*, 294 Ga. App. 359 (2008), the plaintiff alleged that defendants negligently performed an open fundoplication surgical procedure. Plaintiff's expert in his affidavit and during a deposition “simply averred that he had practiced general surgery within the previous five years and had ‘performed many Nissen funduplications and laparoscopic procedures.’” The Court of Appeals affirmed the ruling of the trial court that this evidence was insufficient to carry the burden of proving that the expert met the “three of the last five years” requirement.

In *Carter v. Smith*, 294 Ga. App. 590 (2008), an internist failed to detect a patient's broken hip, and the standard of care expert, though board certified in internal medicine, had not ordered an x-ray or CT scan in over 5 years. There the Court distinguished *Spacht*, where the expert sought to testify regarding a deviation from the standard of care relating to the failure to make a specific diagnosis. Here, the court categorized the expert's opinions as stating the defendant “deviated from the standard of care by not examining Smith after his fall at the long-term-care facility.” **The “treatment which is alleged to have been . . . rendered negligently” (as provided by O.C.G.A. § 24-9-67.1 (c) (2) (A)) was a simple examination of the patient by his physician, not the finding of a specific diagnosis.**

In *Cotten v. Phillips*, 280 Ga. App. 280 (2006), the expert witness, a vascular surgeon, opined that the doctor, an orthopedic surgeon who performed a knee replacement on the patient, was negligent in his pre-surgery assessment of the patient, and negligent in his response to the patient's post-surgery symptoms, resulting in the amputation of the patient's leg below the knee. The doctor argued that, under O.C.G.A. § 24-9-67.1, the witness was not qualified to testify against the doctor since the witness was a vascular surgeon and the doctor was an orthopedic surgeon. The appellate court disagreed. The witness did not allege that the doctor was negligent in his performance of the total knee replacement surgery, but in his failure to assess the vascular

issues involved, particularly in light of the patient's medical history. **Thus, the vascular surgeon was competent to testify because the relevant area of practice or specialty was vascular surgery.** See also *Abramson v. Williams*, 281 Ga. App. 617 (2006) (distinguished in *Smith v. Harris*, 294 Ga. App. 333, 337 (2008)).

LESSON – carefully categorize the “treatment” alleged to have been rendered negligently and the area of practice or specialty in which the expert is testifying. Court may rely on complaint, affidavit or deposition testimony to classify the relevant area of practice/procedure.

Hypothetical: You have a medical malpractice case against a family care practitioner for failure to detect a blood clot or other unusual problem. Who is your medical expert for purposes of the affidavit requirement?

- A. Be careful how you define the medical negligence – failure to diagnose/failure to perform proper examination/failure to refer to a specialist.
- B. May need to retain two experts – a family practitioner and a vascular surgeon – to remove risk that one is not sufficiently experienced in the “area of practice or specialty in which the opinion is given” as determined by the Court.
- C. But see *Smith v. Harris*, 294 Ga. App. 333 (2008); Footnote 2.

In *Collins v. Dickman*, 295 Ga. App. 601 (2008), the Court demonstrated how in-depth it will consider the expert’s recent experiences in order to apply 24-9-67.1.

The record shows that Dr. Ernst, an anesthesiologist, had not had direct patient contact or responsibility in a hospital setting since 1993 and had not administered anesthesia since 1989. Although he claimed to have been a consulting physician at the University of Cincinnati from 1990 to 1996, Dr. Ernst was never employed by that university, never signed an employment or practicing agreement with anyone there, and did not write orders for patients or bill insurance companies for his work there. His role as consultant to an orthopedist at one New York hospital was limited to meeting the orthopedist in the hospital lounge to discuss cases and working with him to develop a computer program reviewing insurance claims. Likewise, Dr. Ernst's work for a health care provider between 1996 and 1998 was limited to determining whether its insureds would be approved for medical treatments. Finally, though Dr. Ernst's resume named him as "Deputy Chief Surgeon" for the New York State and Amtrak police from 1997 or 1998 to the present, a role concerning which he sometimes refused to testify because it might have constituted a "breach of national security," Dr. Ernst was never a surgeon. His duties in these positions involved speaking with police officers having pain problems and referring them to pain management clinics, including one run by his brothers in Florida.

The Court concluded that the expert “had not been engaged in the active practice or teaching of anesthesiology for three of the last five years before Collins's surgery in August 2000 and thus did not satisfy the requirements of O.C.G.A. § 24-9-67.1 (c).

QUESTION FROM COLLINS: Does this opinion allow for substantial discovery into a medical expert’s background in order to substantiate the numerous background facts that it found to be relevant in excluding Plaintiff’s medical standard of care expert?

6. APPLICATION OF STATUTE IN FEDERAL COURT

In diversity cases federal courts follow the general rule that state law governs substantive issues and federal law governs procedural issues. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Generally, rules of procedure encompass rules of evidence, and therefore, the Federal Rules of Evidence, not state evidentiary laws, apply in federal diversity cases. However, pursuant to Federal Rule of Evidence 601, “in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the competency of a witness shall be determined in accordance with State law.” (Emphasis added.) The Eleventh Circuit has interpreted this Rule to mean that, in cases involving state medical malpractice claims, Federal courts should apply state laws to determine competency of expert witnesses. See *McDowell v. Brown*, 392 F.3d 1283, 1295-6 (11th Cir. 2004) (adopting the reasoning in *Legg v. Chopra*, 286 F.3d 286 (6th Cir. 2002) to apply Georgia law as to competency of medical experts).

If you are defending a medical malpractice case filed in federal court based upon diversity (we have one now), the objective criteria from O.C.G.A. § 24-9-67.1(c) should apply.

7. PROFESSIONAL NEGLIGENCE AFFIDAVIT REQUIREMENT

O.C.G.A. § 9-11-9.1. Affidavit to accompany charge of professional malpractice

(a) In any action for damages alleging professional malpractice ... the plaintiff shall be required to file with the complaint an affidavit of an expert competent to testify, which affidavit shall set forth specifically at least one negligent act or omission claimed to exist and the factual basis for each such claim.

Under O.C.G.A. § 24-9-67.1(e), “[a]n 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.” The penalty for failure to supply a proper affidavit is dismissal. *Akers v. Elsey*, 294 Ga. App. 359, 361 (2008).

In *Nathans v. Diamond*, 282 Ga. 804, 804-805 (2007), plaintiff submitted an expert affidavit to support his claims that the defendant deviated from the standard of care in that he failed to adequately inform plaintiff of the potential risks and complications of a surgical procedure. Defendants filed a motion for summary judgment, contending that based upon his initial affidavit, the expert was not qualified to give an opinion in this case under the standards set forth in O.C.G.A. § 24-9-67.1 (c). The trial court primarily addressed the expert’s qualifications as an expert based upon his initial affidavit. The Court ruled that the expert was not qualified to give an opinion about “obtaining informed consent from a patient undergoing the procedures performed” and summary judgment was thus granted to the Defendants.

See also *Cogland v. Hosp. Auth. of Bainbridge*, 290 Ga. App. 73, 77 (2008) (trial court did not err in dismissing medical malpractice complaint when plaintiff’s expert affidavit “contain[ed] nothing concerning [the doctor’s] recent or continuing experience” in the specialty concerning which he was testifying).

A motion to dismiss for failure to comply with O.C.G.A. § 9-11-9.1 must be filed prior to the conclusion of discovery:

If a plaintiff files an affidavit which is allegedly defective, and the defendant to whom it pertains alleges, with specificity, by motion to dismiss filed on or before the close of discovery, that said affidavit is defective, the plaintiff's complaint shall be subject to dismissal for failure to state a claim, except that the plaintiff may cure the alleged defect by amendment pursuant to Code Section 9-11-15 within 30 days of service of the motion alleging that the affidavit is defective.

O.C.G.A. § 9-11-9.1(e)

8. APPLYING THE DAUBERT INQUIRY TO THE SUBSTANTIVE ANALYSIS OF AN EXPERT'S OPINION

A. The Court of Appeals was initially hesitant to critically analyze the substance of an expert's opinions, at least in medical malpractice cases.

In *Cotten v. Phillips*, 280 Ga. App. 280 (2006), an appellant challenged the objective credentials of an expert to testify as to standard of care. The court ultimately held that § 24-9-67.1(c) does not require that plaintiff experts and defendant doctors share the same specialty. *Id.* at 285. However, in the process it stated that “Daubert's role of ensuring that the courtroom door remains closed to junk science is not served by excluding testimony such as this expert's that is supported by extensive relevant experience.” *Id.* Subsequently, in *Mays v. Ellis*, 283 Ga. App. 195, 199 (2007), the appellant challenged both an expert's objective credentials under § 24-9-67.1(c) and his substantive testimony under § 24-9-67.1(b) and Daubert. Though holding that the appellant had not preserved this issue for appeal, the Court made a passing citation to *Cotten* and suggested in dicta that it would admit testimony that is “supported by extensive relevant experience.” 283 Ga. App. at 199, n.3.

In *Canas v. Al-Jabi*, 282 Ga. App. 764, 792 (2006) (overruled on other grounds), Canas challenged the principles and methods relied on by an expert for Al-Jabi to demonstrate the standard of care because two of the sources he identified disagreed with his opinion, and the third could not be considered medical literature. The court declined to perform a Daubert analysis and summarily concluded that, viewing the testimony as a whole (without elaboration), “the trial court was authorized to conclude that he applied reliable principles and methods reliably to the facts of the case.” *Id.* The court was comforted by the fact that “through cross-examination, the appellees have tested and may continue to test [the expert's] application of the authorities upon which he relies to the facts of the case.” *Id.*

See also *Expertise in Law, Medicine, and Health Care*, 26 J. Health Pol., Pol'y & L. 267, 278 (2001) (Professor Daniel W. Shuman explains that “[n]otwithstanding the call for courts to address claims of medical expertise more rigorously under *Daubert*, subsequent case law does not reflect that this potential has been realized.”).

B. Recent cases show trial courts and appellate court performing a more in-depth analysis of the substance of an expert's opinion

Differential diagnosis. In *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 280 (2008), the Court upheld the exclusion of a medical expert on the issue of causation of injuries from exposure to chemicals contained in Varathane. The trial court excluded her opinions because there was insufficient scientific support of her methods of determining causation. Essentially, her methods were based only on her own experience and opinions, without any support in published scientific journals or any reliable techniques for discerning the behaviors and effects of the chemicals contained in Varathane. While she arguable used accepted medical methodology of differential diagnosis, “expert opinions employing differential diagnosis must be based on scientifically valid decisions as to which potential causes should be ‘ruled in’ and ‘ruled out.’” The expert’s opinions did not properly “rule in” the chemical as a potential cause of the plaintiff’s injuries.

This analysis may also be referred to as General v. Specific causation. *Knight v. Kirby Inland Marine Inc.*, 482 F.3d 347, 351 (5th Cir. 2007)

Differential Diagnosis. *Hawkins v. OB-GYN Assocs., P.A.*, 290 Ga. App. 892, 893 (2008). A differential diagnosis satisfies a *Daubert* analysis if the expert uses reliable methods ... based on scientifically valid decisions as to which potential causes should be “ruled in” or “ruled out.” Determining the reliability of an expert's differential diagnosis is a case-by-case determination. “Where an expert employs differential diagnosis to ‘rule out other potential causes’ for the injury at issue, he must also rule in the suspected cause, and do so using ‘scientifically valid methodology.’ ” (Citation and punctuation omitted.) Ruggiero, supra, 424 F3d at 254 (II).

Differential Diagnosis. In *Shiver v. Ga. & Fla. Railnet, Inc.*, 287 Ga. App. 828, 830 (2007), an expert did not satisfy the requirements for a reliable differential diagnosis, which would include considering “all relevant potential causes of the symptoms.” The doctor diagnosed Plaintiff as suffering from reactive airway disease (“RADS”), which he believed was due to chemical exposure, specifically diesel smoke. However, he based his conclusion on an incomplete medical history, which did not include information about earlier lung-related illnesses from a previous chemical exposure.

Differential Diagnosis. In *CSX Transp., Inc. v. McDowell*, 294 Ga. App. 871 (2008), a differential diagnosis was admissible when the doctor recounted that he had performed the differential diagnosis by reviewing plaintiff’s medical history; testing for and excluding other causes of his illness, such as various viruses and diseases; and taking into consideration a report to him about a work incident that had exposed him to hydrogen sulfide the previous December. The doctor also ruled in hydrogen sulfide based on temporal proximity, his knowledge of bodily physiology, the function of the human liver, the fact that hydrogen sulfide is taken up and metabolized by the liver, the effect of toxins such as hydrogen sulfide on the liver, his knowledge of plaintiff’s liver functioning tests prior to the exposure, and his knowledge of plaintiff’s liver functioning test following his exposure.

Limits of opinion. In *Brady v. Elevator Specialists, Inc.*, 287 Ga. App. 304, 307 (2007), the Court held it was error allow an opinion by an elevator expert that a more aggressive maintenance schedule would have revealed the condition in the elevator that led to its mis-leveling and prevented Plaintiff's injured. The expert admitted that he did not know what caused the elevator to mis-level. He also admitted that he did not know if any of the elevator's components had been replaced and that he did not know of any studies or literature that detailed the efficacy of maintenance programs over time. The court thus excluded his opinion as to the causal link between the mis-leveling of the elevator and Defendant's failure to comply with industry standards for maintenance.

Limited to area of expertise. In *Smith v. Liberty Chrysler-Plymouth-Dodge, Inc.*, 285 Ga. App. 606, 609 (2007), the court excluded testimony of experts in accident reconstruction. Although the expert had experience in accident reconstruction, determining a vehicle's rate of speed, course, and point of impact, he did not have adequate knowledge or experience with the mechanical aspects of the vehicle to determine if mechanical failure caused the vehicle to lose control. The Court determined that the relevant area of expertise in this case was not only accident reconstruction, but also knowledge of a vehicle's mechanics and the role of a mechanical failure in the cause of an accident.

Applying the principles and methods reliably to the facts. In *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 280 (2008), the trial court excluded testimony of an expert on labeling based upon the methods he used in reaching his opinion. The trial court noted that he based his opinions primarily on toxicity data concerning Varathane's constituent chemicals without regard to the quantity of each chemical in the product or such factors as evaporation rates, used standards having no specific relevance to consumer use of products, and based his opinion solely on data he obtained from the Internet and from the plaintiff's attorneys. The Supreme Court upheld the finding that his testimony was not "the product of reliable principles and methods. ..." O.C.G.A. § 24-9-67.1(b)(2).

New Methodologies. In *Moran v. Kia Motors Am., Inc.*, 276 Ga. App. 96, 97-98 (2005) plaintiff proffered an expert to testify as to the value of an automobile in a claim for breach of warranty. The expert had personally devised a valuation methodology based on a review of the vehicle's repair records and his own formula for adjusting certain values listed in Kelly's Blue Book. He had relied on this method for approximately one year and had testified in five to ten prior proceedings using this method. The Court excluded his testimony as unreliable because "there was no evidence that the witness's method had been relied upon more widely in the automotive field, nor of the method's known rate of error, nor whether it had been reviewed by qualified experts other than its creators."

9. EXPERIENCE-BASED EXPERTS

A witness may be "qualified as an expert by knowledge, skill, experience, training, or education." O.C.G.A. § 24-9-67.1(b).

Non-scientific Testimony. In *Brady v. Elevator Specialists, Inc.*, 287 Ga. App. 304, 306 (2007), the trial court approved an expert in elevator maintenance. "It is the possession of special

knowledge derived either from experience, study, or both in a field of expertise that makes one an 'expert.' ” The witness worked 31 years for Dover Elevator Company, where his responsibilities included maintenance, repair, and up-grading of existing elevators for customers. Among other things, he was certified as an elevator inspector in the State of Florida and was also certified as a qualified elevator inspector by the American Society of Mechanical Engineers. **The expert testimony is more likely admissible on experience alone when it is not in an area of scientific study.**

Scientific Testimony. In *Mason v. Home Depot U.S.A., Inc.*, 283 Ga. 271, 280 (2008), the Court upheld the exclusion of a medical expert on the issue of causation of injuries from exposure to chemicals contained in Varathane. The trial court excluded her opinions because there was insufficient scientific support of her methods of determining causation. Essentially, her methods were based only on her own experience and opinions, without any support in published scientific journals or any reliable techniques for discerning the behaviors and effects of the chemicals contained in Varathane. **If scientific evidence is available, an experience-based expert may not qualify and testimony must be based upon more than personal observations.**

Expert's "personal practices." In *Condra v. Atlanta Orthopaedic Group*, 285 Ga. 667 (2009), the Court overruled *Johnson v. Riverdale Anesthesia Assocs.*, 275 Ga. 240 (2002) and held that "evidence regarding an expert witness' personal practices, unless subject to exclusion on other evidentiary grounds, is admissible both as substantive evidence and to impeach the expert's opinion regarding the applicable standard of care." *Id.* at 669. In part, the Court based its decision on the importance of an expert's personal experience and practice to the threshold inquiry into the expert's qualifications under O.C.G.A. § 24-9-67.1. *Id.* at 670.

10. DEFERENCE GIVEN TO TRIAL COURTS

"A trial court has broad discretion in determining whether to admit expert testimony, and we will not reverse its ruling absent an abuse of discretion." *CSX Transp., Inc. v. McDowell*, 294 Ga. App. 871 (2008). Georgia appellate courts appear to be hesitant to interfere with the authority of the trial court in this area. *See* cases cited in 8.B *supra*.

Moreover, O.C.G.A. § 24-9-67.1 has no requirement that the trial court make specific findings to affirmatively show that the court carried out its role as gatekeeper. A trial court will be presumed to have performed its duties even absent such findings. *CSX Transp., Inc. v. McDowell*, 294 Ga. App. 871, 873 (2008). *Compare Dodge v. Cotter Corp.*, 328 F. 3d 1212, 1223 (10th Cir. 2003) (without specific findings or discussion on the record, it is impossible on appeal to determine whether the district court carefully and meticulously reviewed the proffered scientific evidence, and in absence of findings, reviewing court will conclude that trial court abused its discretion in admitting such testimony).

The CSX case may be important when considering the manner in which you prepare a proposed order for a judge.

11. PRACTICAL CONSIDERATIONS

A. Challenging expert testimony.

Many state-court judges are unfamiliar with *Daubert* or its progeny, and most judges feel inadequate to undertake a review of opinions proffered by a purported expert on the subject. Additionally, even if capable enough, judges may not have the time necessary to decipher the scientific issues and truly analyze the expert's substantive opinion. See Schuman, 26 J. Health Pol., Pol'y & L. at 283 ("Rigorous independent judicial review of the reliability of the expert's methods and procedures demands more time from an overburdened judiciary. Moreover, it demands a set of skills that are neither required of those who enter the legal profession nor taught as a required part of the law school curriculum."). While Georgia's statute is still in its infancy, judges may need to be thoroughly educated both as to what § 24-9-67.1 and *Daubert* require, and as to the methods of examining the substance of an expert's opinion.

Two separate analyses should take place. First, consider the qualifications of the expert. Second, analyze his/her substantive opinions. The "gatekeeper" role under *Daubert* requires judges to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid." 509 U.S. at 593. "The judge's role is to see that the jury hears reliable and relevant evidence because of its ability to assist in factual determinations, its potential to clarify issues, and its probative value." *McDowell*, 392 F.3d at 1299. The purpose of the *Daubert* analysis is to prevent a supremely qualified expert from waltzing into court and rendering an "expert" opinion that is not supported by the underlying data and scientific process. *McDowell*, 392 F.3d at 1293. In briefs to the court, practitioners might strategically point out the failure of the expert to qualify under the objective criteria of O.C.G.A. § 24-9-67.1, followed by a *Daubert* analysis indicating why the substantive foundation of the expert's opinion is lacking. Federal courts often recognize that when "the relevant reliability concerns may focus upon personal knowledge or experience, inquiries into an expert's qualifications, the reliability of his proffered opinion and the helpfulness of that opinion frequently overlap to a significant degree." *United States v. Frazier*, 387 F.3d 1244, 1296 (11th Cir. 2004) (quotes and citation omitted, citing *Kumho Tire*, 526 U.S. at 150).

Georgia Court have shown a stronger tendency to exclude expert testimony based on the objective criteria in O.C.G.A. § 24-9-67.1(c). If asserted together, the courts' inclination to rule under the objective criteria may give the overlapping *Daubert* analysis some teeth. This approach also allows the practitioner to avoid the *Cotten* view of well-qualified experts.

SUBJECT MATTER OF QUESTIONS FOR EXPERT DEPOSITION

- a. Whether experts are proposing to testify about matters flowing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying;
- b. Whether the expert has adequately accounted for alternative explanations;
- c. Whether the expert is being careful as he would be in his regular professional work outside his paid litigation consulting;

- d. Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give;
- e. What facts were considered in initially forming the expert opinion and what facts were later considered?
- f. What additional facts would be helpful?
- g. What medical data was considered in initially forming the expert opinion and what data was later considered?
- h. What additional data would be helpful?
- i. What scientific principles and methods underlie the reasoning of the expert's opinion?
- j. How were the scientific principles and methods applied in that case while formulating the expert's opinion?
- k. Are there experimental tests that could be performed to test the reasoning employed by the expert?
- l. Have experimental tests been performed to justify the expert's methodology either in this case or prior to this case?
- m. Has the technique or reasoning employed by the expert been subjected to peer review and publication?
- n. Is there a known error rate in the reasoning employed by the expert?
- o. What steps or areas of the experts reasoning or methodology are subject to potential error, and what is the rate of error in each those areas?
- p. Has the expert's technique, reasoning or methodology been generally accepted in the proper scientific community, and if so, what scientific literature supports that reasoning and demonstrate scientific acceptance?
- q. Has the expert done any medical research, and in what areas of medicine?
- r. What research has the expert performed in conjunction with this litigation;?
- s. Has the expert previously espoused the opinion or a similar opinion that he is proffering in this case, and where would that opinion be published or found?
- t. Is there any scientific study that relates to facts similar to those on which the expert relied, and if so, where can they be found?
- u. Was the expert required to extrapolate from a known scientific facts or principle to apply that principle to the facts presented here?
- v. If the expert was required to extrapolate on a scientific fact or principle, what was the scientific basis for that extrapolation?
- w. Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion?

- x. What alternative explanation exists for the Plaintiff's condition or injury?
- y. How did the expert take into account those alternative explanations in coming to his conclusion in this case?
- z. How many hours has the expert spent in considering the facts of this case?
- aa. What literature has the expert reviewed in analyzing this cases or forming his opinion in this case?

B. Admitting expert testimony.

Be certain that your expert meets the objective criteria established in O.C.G.A. § 24-9-67.1(c), if applicable. Inform the expert witnesses of the necessity to carefully classify the area of practice or specialty in which his opinion is to be given so that it falls within his/her qualifications. Include all pertinent information to satisfy the objective criteria within the expert's original affidavit (be careful not to box in the expert witness as opinions often must shift during discovery)

Find scientific literature/studies for your expert to reference to support his opinions., even if it is simply foundational science. The more material the judge is required to review, the less likely he/she is to find it deficient.

Avoid the pitfalls that caused the experts to be excluded in the above cases. Prepare your expert to answer the foregoing deposition questions/subjects that may be covered by the adverse party.

If a *Daubert* motion is challenged, present a subsequent affidavit to clarify and explain all opinions that the expert offered during deposition testimony. This provides a more difficult target for the challenging party and a more difficult analysis for the judge to exclude your expert. Explain away any "sound bites" on which the challenging party attempt to rely.

If your expert is excluded prior to trial you can still file voluntary dismissal prior to entry of judgment. *McKesson Corp. v. Green*, 286 Ga. App. 110, 116 (2007). You may get a second bite at the apple to find a better expert.

FOUNDATIONAL QUESTIONS TO QUALIFY ANY EXPERT:

NOTE: If you are at trial, theoretically your expert has survived any potential *Daubert* challenge and he/she is automatically qualified as an expert witness. *See Bailey v. Edmundson*, 280 Ga. 528, 533 (2006) (where, after trial had begun, party requested a hearing to determine whether expert testimony would satisfy the requirements of O.C.G.A. § 24-9-67.1, "[t]he trial court correctly denied that request, since such a hearing and the ruling thereon shall be completed no later than the final pretrial conference contemplated under O.C.G.A. § 9-11-16") (citation and punctuation omitted).

See § 1:8 of Judge Dickert's book, Handbook on Foundations and Objections.