

Fall 2004

Say Goodbye to Frye: Missouri Supreme Court Clarifies Standard for Admitting Expert Testimony in Civil and Administrative Cases

Jaime M. Nies

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Jaime M. Nies, *Say Goodbye to Frye: Missouri Supreme Court Clarifies Standard for Admitting Expert Testimony in Civil and Administrative Cases*, 69 MO. L. REV. (2004)

Available at: <https://scholarship.law.missouri.edu/mlr/vol69/iss4/18>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Say Goodbye to *Frye*: Missouri Supreme Court Clarifies Standard for Admitting Expert Testimony in Civil and Administrative Cases

*State Board of Registration for the Healing Arts v. McDonagh*¹

I. INTRODUCTION

There are many questions that a court must address when determining whether to admit expert testimony.² The reliability of the scientific method, facts, and information used by the expert in forming her opinion is a major issue. With all of the major scientific advances throughout the last century, courts have struggled with new scientific methods and have developed a number of tests to determine the admissibility of expert testimony.

In *State Board of Registration for the Healing Arts v. McDonagh*,³ the Supreme Court of Missouri clarified the standard of admissibility for expert testimony in civil cases and administrative proceedings. This Note will examine the different standards that Missouri courts have applied and explore how the new *McDonagh* standard will impact Missouri courts.

II. FACTS AND HOLDING

The State Board of Registration for the Healing Arts (the “Board”) is charged with the duty of licensing and supervising Missouri physicians and surgeons.⁴ In 1961, the Board granted a medical license to Dr. Edward W. McDonagh (“McDonagh”), an osteopathic physician and surgeon.⁵ Shortly thereafter, McDonagh began using ethylene diamine tetra-acetic acid (“EDTA”) chelation therapy⁶ on his elderly patients who were suffering from atherosclerosis.⁷ At the time, the Board did not have any rules or regulations

1. 123 S.W.3d 146 (Mo. 2003) (en banc).

2. See FED. R. EVID. 702 advisory committee’s note (“An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge.”).

3. 123 S.W.3d 146 (Mo. 2003) (en banc).

4. *Id.* at 149.

5. *Id.*

6. Chelation therapy consists of the intravenous administration of EDTA which combines with substances in the body that block arteries. *Id.* at 149 n.3, 150 n.4. These substances are expelled from the patient’s body through urine. *Id.*

7. *Id.* at 149. Atherosclerosis is “the process in which deposits of fatty substances, cholesterol, cellular waste products, calcium and other substances build up in

regarding chelation therapy,⁸ but it eventually adopted a rule⁹ in 2001 concluding that such therapy had “no medical value.”¹⁰

The Board filed a complaint against McDonagh in 1994 after it received inquiries about McDonagh’s use of chelation therapy.¹¹ “This complaint was later dismissed without prejudice.”¹² In 1996, the Board again filed a complaint against McDonagh.¹³ This thirteen-count complaint alleged that McDonagh should be disciplined for endangering his patients’ health by using chelation therapy and misrepresenting its effectiveness.¹⁴

The Administrative Hearing Commission (the “Commission”) held a hearing in which McDonagh offered expert testimony from physicians who practiced chelation therapy to show that the treatment was effective.¹⁵ The Board claimed that the physicians’ expert testimony did not pass the test developed in *Frye v. United States*¹⁶ and moved to exclude it,¹⁷ however, the Commission admitted the testimony, finding that it satisfied the standards in both *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹⁸ and *Frye*.¹⁹ Relying on the physicians’ testimony, the Commission concluded that there was “no cause to discipline Dr. McDonagh’s medical license.”²⁰ After the Commission’s decision was affirmed by the Circuit Court of Cole County,²¹ the Missouri Court of Appeals for the Western District agreed that the expert testi-

the inner lining of an artery.” American Heart Association, Atherosclerosis, available at <http://www.americanheart.org/presenter.jhtml?identifier=4440> (last visited Dec. 4, 2004).

8. *Healing Arts*, 123 S.W.3d at 150. The Food and Drug Administration (FDA) approved the use of chelation therapy to remove heavy metals from a patient’s body. *Id.* at 149-50. McDonagh’s use of the therapy was not FDA-approved, but it was not expressly prohibited by the FDA. *Id.* at 150. About one thousand physicians throughout the United States use chelation therapy in this non-approved manner. *Id.*

9. MO. CODE REGS. ANN. tit. 4, § 150-2.165 (2003) (stating that “the use of . . . (EDTA) chelation on a patient is of no medical or osteopathic value except for those uses approved by the Food and Drug Administration”).

10. *Healing Arts*, 123 S.W.3d at 150-51.

11. *Id.* at 151.

12. *Id.*

13. *Id.*

14. *Id.*

15. State Bd. of Registration for the Healing Arts v. McDonagh, No. 96-2543 HA (Mo. Admin. Hearing Comm’n Jan. 26, 2000), available at <http://www.oa.state.mo.us/ahc/case/McDonagh96-2543HA.WCR.doc>.

16. 293 F. 1012 (D.C. Cir. 1923). See *infra* notes 31-33 and accompanying text.

17. State Bd. of Registration for the Healing Arts v. McDonagh, No. WD 60501, 2003 WL 1477049, at * 2 (Mo. Ct. App. Mar. 25, 2003), transferred, 123 S.W.3d 146 (Mo. 2003) (en banc).

18. 509 U.S. 579 (1993). See *infra* notes 44-47 and accompanying text.

19. *Healing Arts*, 2003 WL 1477049, at *2.

20. *Id.*

21. *Id.*

mony was admissible under Missouri Revised Statute Section 490.065²² and rejected the Board's argument that the *Frye* test should be applied.²³ However, the court reversed and remanded the Commission's decision for insufficient evidence.²⁴

The Missouri Supreme Court granted transfer to decide the appropriate standard for the admissibility of expert testimony.²⁵ The high court held that the admissibility standard for expert testimony in civil cases is not *Frye* or *Daubert*, but Section 490.065.²⁶ In addition, the court held that this standard applies not only in civil cases, but in administrative proceedings as well.²⁷ The court remanded the case to the commission "on all counts for further review in light of [S]ection 490.065."²⁸

III. LEGAL BACKGROUND

A. *Frye and Missouri Courts*

Courts have long struggled in determining the admissibility of expert testimony, especially with regard to what methods experts may use to reach their conclusion. Prior to 1923, many courts focused primarily on "whether the expert was qualified."²⁹ They also considered the relevancy of the evidence and how helpful it would be to the court.³⁰ In 1923, the United States Court of Appeals for the District of Columbia formulated the *Frye* test to determine the admissibility of an expert's testimony based on a new scientific procedure.³¹ That court concluded that the method used by an expert "must be sufficiently established to have gained general acceptance in the particular field in which it belongs."³² Most states and other federal courts followed this "general acceptance" test.³³

22. MO. REV. STAT. § 490.065 (2000). See *infra* note 42.

23. *Healing Arts*, 2003 WL 1477049, at *5.

24. *Id.*

25. *State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146, 151-52 (Mo. 2003) (en banc).

26. *Id.* at 153.

27. *Id.* at 155.

28. *Id.* at 160.

29. Robin Jean Davis, *Admitting Expert Testimony in Federal Courts and Its Impact on West Virginia Jurisprudence*, 104 W. VA. L. REV. 485, 487 (2002).

30. *Id.* at 487-88.

31. *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding that a "systolic blood pressure deception test" had not yet reached the general acceptance needed and was not admissible).

32. *Id.*

33. Alice B. Lustre, Annotation, *Post-Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R.5th 453, § 31 (2004). Fifteen states continue to follow the *Frye* test. *Id.* at § 2.

The Missouri Supreme Court first adopted the *Frye* test in 1972 in a criminal case.³⁴ This test was modified eight years later, changing the standard from “general acceptance” to “wide scientific approval” of the new scientific method.³⁵ In *Alsbach v. Bader*,³⁶ the Missouri Supreme Court applied the modified *Frye* test in a civil case.³⁷ At issue in that case was the admissibility of testimony rendered with the aid of hypnosis.³⁸ Alsbach, the plaintiff, was hypnotized by a psychiatrist to aid in the recovery of Alsbach’s memory of an automobile accident.³⁹ The court held that hypnosis was not “general[ly] accept[ed] in the relevant scientific community.”⁴⁰ Following *Alsbach*, the *Frye* test was applied in a number of other civil cases in Missouri.⁴¹

B. Missouri Revised Statute Section 490.065 and Daubert

In 1989, the Missouri General Assembly enacted Missouri Revised Statute Section 490.065 to deal with the admissibility of expert testimony.⁴² Despite this new statute, Missouri courts continued to apply the *Frye* test.⁴³

34. *State v. Stout*, 478 S.W.2d 368, 371 (Mo. 1972) (holding that “neutron activation analysis” did not pass the *Frye* general acceptance test).

35. *State v. Biddle*, 599 S.W.2d 182, 191 (Mo. 1980) (en banc) (holding that a polygraph test lacked “wide scientific approval” and was inadmissible).

36. 700 S.W.2d 823 (Mo. 1985) (en banc), *superseded by statute as stated in State Bd. of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. 2003) (en banc).

37. *Id.* at 828.

38. *Id.* at 823.

39. *Id.* at 824.

40. *Id.* at 830.

41. *See, e.g., Brooks v. SSM Health Care*, 73 S.W.3d 686, 694 (Mo. Ct. App. 2002) (holding in a medical negligence case that a doctor’s testimony on the standard of care was properly admitted under the wide scientific approval test of *Biddle*); *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 200 n.79 (Mo. Ct. App. 1988) (rejecting claim that expert’s diagnostic procedure did not satisfy the *Frye* test); *Turner v. Fuqua Homes, Inc.*, 742 S.W.2d 603, 612 (Mo. Ct. App. 1987) (acknowledging that Missouri adopted the *Frye* general acceptance standard).

42. MO. REV. STAT. § 490.065 (2000). This statute provides:

1. In any civil action, 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.
2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by ex-

In 1993, the United States Supreme Court ruled that Federal Rule of Evidence 702 superseded the *Frye* test in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁴⁴ The Court held that judges, not the scientific community, have the role of gatekeeper when it comes to the admissibility of expert testimony.⁴⁵ The Court also set out a list of factors to guide courts when determining admissibility under the new standard.⁴⁶ The general acceptance test became merely one of the factors.⁴⁷

Because Missouri Revised Statute Section 490.065 was similar to Federal Rule of Evidence 702, Missouri courts were conflicted about whether Missouri's statute superseded previous case law endorsing the *Frye* standard. In *Callahan v. Cardinal Glennon Hospital*,⁴⁸ the Missouri Supreme Court refused to decide if the statute supplanted *Frye* because the appellant in that case had not preserved its objection to the admissibility of the plaintiff's experts.⁴⁹ In *Lasky v. Union Electric Co.*,⁵⁰ the issue of which standard to apply came before the Missouri Supreme Court again. In remanding that case, the court instructed the trial court to "be guided by Section 490.065, RSMo, in evaluating the admission of expert testimony."⁵¹ Since the supreme court was not explicit in holding that this statute had superseded *Frye*, the three districts of the Missouri Courts of Appeals remained split about which standard to use.

In its western district, the Missouri Court of Appeals has applied both the *Frye* test and Section 490.065, with and without the aid of the *Daubert*

perts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.

4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.

43. See, e.g., *Bray v. Bi-State Dev. Corp.*, 949 S.W.2d 93, 98 (Mo. Ct. App. 1997).

44. 509 U.S. 579, 589 (1993). The federal rules were later amended to incorporate *Daubert*. FED. R. EVID. 702 advisory committee's note.

45. *Daubert*, 509 U.S. at 579-80.

46. The *Daubert* Court set forth the following factors: "whether the theory or technique has been subject to peer review and publication;" "whether it can be (and has been) tested;" "the known or potential rate of error;" and "general acceptance." *Id.* at 593-94.

47. *Id.* at 594.

48. 863 S.W.2d 852 (Mo. 1993) (en banc).

49. *Id.* at 860 ("[I]t would be inappropriate for us to decide in this case whether section 490.065 . . . supersedes the *Frye* doctrine in the same manner that *Daubert* held that Federal Rule 702 changes the requirements for the admissibility of expert testimony in federal court.").

50. 936 S.W.2d 797 (Mo. 1997) (en banc).

51. *Id.* at 801.

factors. In *Whitman's Candies, Inc. v. Pet Inc.*,⁵² the court of appeals considered the admissibility of a consumer psychologist's testimony.⁵³ The defendant argued that the admissibility of expert testimony was governed by Section 490.065 and since this Section was similar to Federal Rule of Evidence 702, *Daubert* was instructive.⁵⁴ Noting that the Missouri Supreme Court had not yet expressly overruled *Frye*, the court concluded that the expert testimony satisfied both the *Frye* and *Daubert* standards.⁵⁵ Consequently, the court declined to determine which standard was appropriate.⁵⁶ In a later case, *McReynolds v. Mindrup*,⁵⁷ the court reviewed a trial court's decision to exclude expert testimony because it did not pass the *Frye* test.⁵⁸ The court found that the trial court should not have applied *Frye* because the testimony did not deal with *scientific* methods.⁵⁹ Again, the court did not determine whether *Frye* was superseded.⁶⁰ In *Keyser v. Keyser*,⁶¹ the court applied only Section 490.065 without mentioning the *Daubert* factors.⁶² The court held that it was not an abuse of discretion to admit a psychiatrist's testimony regarding his diagnosis when that diagnosis is based on examination of the patient and the patient's medical records.⁶³

The Missouri Court of Appeals for the Southern District continued to follow *Frye* for scientific evidence, but applied Section 490.065 to non-scientific evidence. In *Long v. Missouri Delta Medical Center*,⁶⁴ a medical malpractice case, the court held that a medical economist's testimony was properly admitted.⁶⁵ The court stated that "there seems to be a consensus among appellate courts" that the *Frye* test was still followed in Missouri.⁶⁶ The court held that the *Frye* test was to be followed for scientific evidence and further concluded that Section 490.065, without using the *Daubert* fac-

52. 974 S.W.2d 519 (Mo. Ct. App. 1998), *abrogated* by State Bd. of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo. 2003) (en banc).

53. *Id.*

54. *Id.* at 528.

55. *Id.*

56. *Id.*

57. 108 S.W.3d 662 (Mo. Ct. App. 2002), *abrogated* by *Healing Arts*, 123 S.W.3d 146.

58. *Id.* at 665-66.

59. *Id.* at 668.

60. *Id.* at 666 n.2.

61. 81 S.W.3d 164 (Mo. Ct. App. 2002).

62. *See id.*

63. *Id.* at 169-70.

64. 33 S.W.3d 629 (Mo. Ct. App. 2000), *abrogated* by State Bd. of Registration for the Healing Arts, 123 S.W.3d 146 (Mo. 2003) (en banc).

65. *Id.* at 643. The medical economist testified regarding his calculations of the future medical care costs of disabled children. *Id.*

66. *Id.* at 642.

tors, governed the admissibility of expert testimony on non-scientific evidence.⁶⁷

The Missouri Court of Appeals for the Eastern District continued to follow the *Frye* test. In *Bray v. Bi-State Development Corp.*,⁶⁸ the court noted that “Missouri ha[d] adopted the *Frye* rule for determining the admissibility of new scientific techniques.”⁶⁹ In *M.C. v. Yeargin*,⁷⁰ a negligence action, the court examined the admissibility of a doctor’s testimony.⁷¹ The court held that the trial court abused its discretion because it admitted the doctor’s testimony without applying the *Frye* test.⁷²

C. Evidence Rules and Administrative Hearings

Administrative tribunals are not bound by all the same rules of evidence as civil courts. According to the Missouri Supreme Court, an administrative tribunal does not have to follow a technical rule of evidence,⁷³ but the tribunal does have to follow a fundamental⁷⁴ evidence rule.⁷⁵ While the administrative tribunal must follow fundamental rules, Missouri courts have still upheld the admissibility of evidence that such rules would usually exclude as long as there was other “competent and substantial evidence” to support the decision made in the administrative hearing.⁷⁶ In *State ex rel. Bond v. Simmons*,⁷⁷ the court upheld the administrative tribunal’s admission of hearsay and conclusory statements made by the witness even though the evidence is governed by

67. *Id.* at 642-43. The Southern District continued to adhere to the modified *Frye* test for scientific evidence in a subsequent case. *Brooks v. SSM Health Care*, 73 S.W.3d 686, 694 (Mo. Ct. App. 2002).

68. 949 S.W.2d 93 (Mo. Ct. App. 1997).

69. *Id.* at 98.

70. 11 S.W.3d 604 (Mo. Ct. App. 1999), *abrogated by* State Bd. of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146 (Mo. 2003) (en banc).

71. *Id.* at 619.

72. *Id.* at 619-20.

73. Technical rules of evidence have included “leading questions and other informalities.” *State ex rel. De Weese v. Morris*, 221 S.W.2d 206, 209 (Mo. 1949).

74. Fundamental rules of evidence have included hearsay and conclusions by witnesses. *See State ex rel Bond v. Simmons*, 299 S.W.2d 540, 545 (Mo. Ct. App. 1957).

75. *Mo. Church of Scientology v. State Tax Comm’n*, 560 S.W.2d 837, 839 (Mo. 1977) (en banc) (citing *Simmons*, 299 S.W.2d at 545) (stating “technical rules of evidence are not controlling in administrative hearings, [but] fundamental rules of evidence are applicable”).

76. *See Simmons*, 229 S.W.2d at 545 (affirming judgment because “the decision of the Commission is clearly based upon an abundance of competent and substantial evidence”). The Missouri Constitution mandates that judicial review of an administrative decision affecting private rights determine that the decision is “supported by competent and substantial evidence upon the whole record.” MO. CONST. art. V, § 18.

77. 299 S.W.2d 540 (Mo. Ct. App. 1957).

a fundamental rule.⁷⁸ The court found that the evidence, “in the main,” was both “competent and relevant.”⁷⁹

IV. INSTANT DECISION

The Missouri Supreme Court granted transfer of the instant case to determine the standard for the admissibility of expert testimony.⁸⁰ Contending that Missouri follows the *Frye* test, the Board argued that McDonagh’s expert testimony should not have been admitted.⁸¹ McDonagh, however, contended that Missouri no longer follows the *Frye* test but instead follows either *Daubert* or Section 490.065.⁸² The court concluded that its decision in *Lasky v. Union Electric Co.*⁸³ “that the standard for the admission of expert testimony in civil cases is that set forth in Section 490.065” should have cleared away this confusion.⁸⁴

The court next addressed whether Section 490.065 applies to administrative hearings.⁸⁵ The Board argued that it did not apply because the language of Section 490.065 says it only applies “in any civil action.”⁸⁶ However, the court pointed out that neither civil procedure rules nor administrative procedure rules govern the admissibility of expert testimony, but rather the principles of evidence determine the admissibility.⁸⁷ Following the precedent in *State ex rel. De Weese*,⁸⁸ that technical evidence rules do not have to be followed in administrative hearings but fundamental rules of evidence do, the court held that the admissibility of expert testimony is a fundamental rule of evidence.⁸⁹ Therefore, Section 490.065 should be followed in administrative proceedings.⁹⁰

78. *Id.* at 545.

79. *Id.*

80. State Bd. of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146, 151-52 (Mo. 2003) (en banc).

81. *Id.* at 152.

82. *Id.*

83. 936 S.W.2d 797 (Mo. 1997) (en banc). See *supra* notes 50-51 and accompanying text.

84. *Healing Arts*, 123 S.W.3d at 153. Judge Wolff made this clear with his advice for lawyers: “Forget *Frye*. Forget *Daubert*. Read the statute. Section 490.065 is written, conveniently, in English. It has 204 words. Those straightforward statutory words are all you really need to know about the admissibility of expert testimony in civil proceedings.” *Id.* at 160 (Wolff, J., concurring in part and dissenting in part).

85. *Id.* at 153-55.

86. *Id.* at 153-54.

87. *Id.* at 154.

88. 221 S.W.2d 206 (Mo. 1949).

89. *Healing Arts*, 123 S.W.3d at 154-55.

90. *Id.* at 155.

Although the court did not adopt *Daubert*, it concluded that for those provisions of Section 490.065 that mirror FRE 702 and FRE 703, the *Daubert* standards and the cases that interpret *Daubert* can guide Missouri courts.⁹¹ These guidelines, however, do not apply where Section 490.065 and the federal rules differ.⁹² While Section 490.065 “requires a showing that the facts and data are of a type reasonably relied on by experts in the field in forming opinions or inferences upon the subject of the expert’s testimony,” FRE 703 only requires this showing when determining “whether the facts or data must be otherwise admissible.”⁹³ Because of this difference, the “relevant scientific community” must always be identified in Missouri but not under the federal rules.⁹⁴ In addition, a Missouri court must “independently assess” the reliability of the facts and data.⁹⁵

Since Missouri courts must determine the relevant community in each case, the identity of the community to which McDonagh’s experts belonged was important.⁹⁶ McDonagh argued that the relevant community was the community of doctors that practice chelation therapy.⁹⁷ The court disagreed, finding that the relevant community should be determined “by the standards in the field in which the doctor has chosen to practice.”⁹⁸ As applied to McDonagh, the relevant community consisted of doctors who treat patients with vascular disease.⁹⁹

After ruling that Section 490.065 controls the admissibility of expert testimony, the court addressed the issue of what data are required under Section 490.065 and rejected the Board’s argument that controlled studies were necessary.¹⁰⁰ The court explained that controlled studies are a kind of data and the admissibility of an expert’s testimony does not depend on the kind of data but whether it is data that is reasonably relied on in the relevant field.¹⁰¹ The court explained that the absence of a controlled study is relevant to the court’s

91. *Id.* The first part of FRE 702 and Missouri Revised Statute Section 490.065.1 are almost identical. *Id.* These provisions state “[i]f 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.” *Id.* (quoting FED. R. EVID. 702; MO. REV. STAT. 490.065.1 (2000)). Section 490.065.1 is different in that it adds “in any civil action.” *Id.*

92. *Id.*

93. *Id.* at 156.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.* at 156-57.

100. *Id.* at 157.

101. *Id.*

decision but not conclusive.¹⁰² The only way it could be conclusive is if the “relevant scientific community” absolutely demanded that there be controlled studies.¹⁰³

The Missouri Supreme Court reversed the lower court’s decision because the Commission did not take the appropriate relevant community into account or apply the other standards under Section 490.065 when admitting McDonagh’s experts. The court further remanded the case directing the Commission to use Section 490.065 in deciding whether to admit the expert testimony.¹⁰⁴

V. COMMENT

With this holding, Missouri joins four other states that do not follow *Frye* or *Daubert* in civil cases.¹⁰⁵ Arguably, however, the standard adopted by the Missouri Supreme Court is a more rigid form of the *Daubert* test. The court indicated that lower courts can use *Daubert* and its progeny to guide them in determining most expert testimony admissibility issues.¹⁰⁶ The majority of Section 490.065 is similar to FRE 702 and 703, suggesting that many Missouri courts will use *Daubert* as a guide.¹⁰⁷ In fact, the provisions are so similar that other states that have the same provision as Section 490.065.1 have decided to adopt *Daubert*.¹⁰⁸

The Missouri approach is arguably stricter than *Daubert* because it requires that a court define the “relevant scientific community” in each and every case.¹⁰⁹ While this may not seem like a major requirement, it could cause otherwise admissible testimony to be totally excluded. For instance, assume McDonagh’s experts were using data only from within the field of chelation therapy. To be admissible under the Missouri statute, however, his experts needed to use data reasonably relied on by the community of vascular physicians. Under the federal approach, if the experts could otherwise satisfy the *Daubert* factors, the relevant community is immaterial unless a party

102. *Id.*

103. *Id.*

104. *Id.* at 160.

105. *See Lustre, supra* note 33, §§ 50-53. These four states are Georgia, Utah, Virginia, and Wisconsin. *Id.*

106. *Healing Arts*, 123 S.W.3d at 155.

107. For instance, Section 490.065.1 is similar to FRE 702, except for the post-*Daubert* amendments. *See supra* note 91 and accompanying text.

108. *See, e.g., State v. Coon*, 974 P.2d 386, 395 (Alaska 1999) (holding that Alaska Rule of Evidence 702 supersedes *Frye* and that *Daubert* should now be followed); *Farm Bureau Mut. Ins. Co. v. Foote*, 14 S.W.3d 512, 519 (Ark. 2000) (adopting the *Daubert* standard under Arkansas Rule of Evidence 702).

109. MO. REV. STAT. § 490.065.3 (2000).

wanted to admit the underlying facts or data rather than just the expert's conclusions.¹¹⁰

In Missouri, the courts must go one step further after identifying the relevant community. Even if the facts and data are reasonably relied on by the experts within this community, the court must make an independent judgment that the facts and data are reasonable.¹¹¹ The Missouri General Assembly likely added this extra hurdle to exclude so-called "junk science" and to ensure that judges make the final determination of the admissibility of expert opinions.¹¹²

The importance of the court's independent judgment is illustrated by a recent decision of the Missouri Court of Appeals for the Western District which relied on the holding of *McDonagh*. In *McGuire v. Seltsam*,¹¹³ an automobile accident case, the defendant offered the testimony of a psychiatrist claiming that the plaintiff had a somatization disorder.¹¹⁴ The psychiatrist explained that the standard in her profession when diagnosing this disorder was to determine if the plaintiff had "somatic complaints that are not substantiated by an organic cause prior to age 30."¹¹⁵ The psychiatrist examined only the medical records of the plaintiff from the age of 34 to the present.¹¹⁶ She explained that when the records are not available prior to the age of 30, psychiatrists use the later medical records to determine if any of the conditions existed before the age of 30.¹¹⁷ While this may be what experts in this field rely on, the court found it to be "based upon speculation and conjecture" and held that the trial court should not have admitted the testimony.¹¹⁸ This strict *Daubert*-like test may make it more difficult for an attorney to have expert

110. In *Daubert*, the Court noted that "[a] 'reliability assessment does not require, although it does permit, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within that community.'" *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 594 (1993) (quoting *United States v. Downing*, 753 F.2d 1224, 1238 (3d Cir. 1985)).

111. *Healing Arts*, 123 S.W.3d at 156. The Supreme Court of Missouri accurately interpreted the statute as requiring this extra hurdle on the admission of expert testimony. The relevant portion of the statute that requires this states that the facts and data used by the expert "must be otherwise reasonably reliable." MO. REV. STAT. § 490.065.3.

112. *See State v. Coon*, 974 P.2d 386, 395-96 (Alaska 1999) (explaining that "[d]etermining reliability for judicial purposes is unavoidably the responsibility of trial courts, and should not be delegated to an expert's peers").

113. No. WD 61448, 2004 WL 502308 (Mo. Ct. App. Mar. 16, 2004), *transferred*, 138 S.W.3d 118 (Mo. 2004) (en banc).

114. *Id.* at *1. A patient with a somatization disorder complains of physical symptoms that the doctor finds have no physical cause or the description of the symptoms "are greatly in excess of that which the doctor would expect to see." *Id.*

115. *Id.* at *3.

116. *Id.*

117. *Id.*

118. *Id.* at *4.

testimony admitted. *Daubert* itself has proven to be stricter than *Frye*,¹¹⁹ and the Missouri approach is even stricter than *Daubert*.

The court's holding also impacts Missouri administrative proceedings.¹²⁰ The court claimed that admissibility of expert testimony is a fundamental rule of evidence.¹²¹ The court does not explain what constitutes a fundamental rule of evidence and why expert testimony falls into that category.¹²² However, previous Missouri cases have held that hearsay rules and the common law lay-witness opinion rule are fundamental rules of evidence.¹²³ Hearsay is an important evidentiary safeguard that implicates the Sixth Amendment Confrontation Clause.¹²⁴ Like hearsay, reliable expert testimony is also an important evidentiary safeguard. The purpose of expert testimony is to aid the fact-finder. If the facts and data used by the expert are not reliable, the purpose is frustrated and the fact-finder is actually misled. In fact, there has been much debate over whether jurors blindly accept what the experts say, and it has been suggested that *Daubert* was an effort to give the judge more control in protecting the jury from unreliable experts.¹²⁵ Because

119. David E. Bernstein, *Frye, Frye, Again: The Past, Present, and Future of the General Acceptance Test*, 41 JURIMETRICS J. 385, 404 (2001).

120. State Bd. of Registration for the Healing Arts v. McDonagh, 123 S.W.3d 146, 154-55 (Mo. 2003) (en banc). While Section 490.065 applies to civil and administrative proceedings, *Frye* is still followed in criminal cases in Missouri. State v. Keightley, 147 S.W.3d 179, 187 n.7 (“We are cognizant of our supreme court’s holding in [*Healing Arts*], stating that Section 490.065, and not *Frye*, is the applicable standard for determining the admissibility of expert testimony in civil cases. This does not, however, affect the applicability of *Frye* to criminal cases.”).

121. *Healing Arts*, 123 S.W.3d at 154-55. If it were only a technical rule of evidence, the administrative court would not have to follow Section 490.065 in admitting expert testimony.

122. At least one other state has considered expert testimony a technical rule of evidence. *Armstrong v. City of Wichita*, 907 P.2d 923, 929 (Kan. Ct. App. 1995) (“To apply the *Daubert* or the *Frye* standard to a workers compensation case would be to apply technical rules of procedure to which neither the ALJ nor the Board are subject.”).

123. See, e.g., State ex rel. De Weese v. Morris, 221 S.W.2d 206, 209 (Mo. 1949) (hearsay evidence); State ex rel. Bond v. Simmons, 299 S.W.2d 540, 545 (Mo. Ct. App. 1957) (hearsay and conclusions by witnesses).

124. U.S. CONST. amend. VI (stating “the accused shall enjoy the right . . . to be confronted with the witnesses against him”). See *California v. Green*, 399 U.S. 149, 155 (1970) (stating “that hearsay rules and the Confrontation Clause are generally designed to protect similar values”).

125. Neil Vidmar & Sheri Seidman Diamond, *Juries and Expert Evidence*, 66 BROOK. L. REV. 1121, 1124-25 (2001) (“[T]he Court, by stressing the judge’s role as gatekeeper, appears implicitly to have assumed that the judge should protect the jury.”). See also Sanja Kutnjak Ivkovic & Valerie P. Hans, *Jurors’ Evaluations of Expert Testimony: Judging the Messenger and the Message*, 28 LAW & SOC. INQUIRY 441, 442 (2003) (“One key assumption underlying the *Daubert* line of cases is that jurors might be duped by a persuasive but untrustworthy expert who testifies about

Missouri's expert testimony standard is more rigid than *Daubert*, Missouri obviously believes in protecting the jury a great deal. A rule of evidence based on such a strong belief can accurately be classified as fundamental.

VI. CONCLUSION

In *Board of Registration for the Healing Arts v. McDonagh*,¹²⁶ the Missouri Supreme Court clarified for the lower courts the standard of admissibility for expert testimony. The court explicitly held that Missouri follows Section 490.065, no longer follows *Frye*, and does not adopt *Daubert*.¹²⁷ The Missouri Supreme Court's interpretation of Section 490.065 indicates that Missouri courts will follow a strict *Daubert*-like standard, but Missouri's standard is more rigorous than *Frye* or *Daubert*.

The court also extended the application of Section 490.065 to administrative proceedings. This will greatly affect the admissibility of expert testimony in such proceedings. After the instant decision, Missouri courts and attorneys should be clear that Missouri no longer follows *Frye*. Instead, Section 490.065 alone is the standard for admitting expert testimony in civil and administrative proceedings in Missouri.

JAIME M. NIES

matters that are not based on sound scientific principles or data.”). Recent research, however, has shown that jurors do not blindly accept what the expert says and that juries take into consideration the “adversarial context in assessing expert credibility.” *Id.* at 478-79.

126. 123 S.W.3d 146 (Mo. 2003) (en banc).

127. *Id.* at 153-55.

