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WHERE ARE THE GATEKEEPERS? CHALLENGING UTAH'S THRESHOLD STANDARD FOR ADMISSIBILITY OF EXPERT WITNESS TESTIMONY

Samuel D. Hatch*

INTRODUCTION

It is well established that trial courts act as gatekeepers to shield the jury from unreliable expert witness testimony,[1] but in Utah the gatekeepers have all but vanished. Under Utah Rule of Evidence 702, a proponent of expert testimony need only make a threshold showing of reliability to gain a stamp of approval and be admitted into Utah courts.[2] This standard has steadily shriveled since its inception in 2007 and now requires little more than a nod of the gatekeeper's head.[3] With such a low bar to clear, trial courts must now admit virtually all expert testimony.[4] This, in turn, has progressively increased the risk of admitting faulty and unreliable testimony.[5] When the State of Utah originally adopted the Federal Rules of Evidence several years prior to 2007, it did so to "supply a fresh starting place for the law of evidence . . . ."[6] A similar fresh starting place is needed again today.

Part I of this Note provides relevant background information about both the federal and Utah Rules of Evidence regarding the admissibility of expert witness testimony. Part II discusses the issues that have developed in Utah law because of the State's minimal threshold standard. In particular, it examines how the standard has significantly reduced the trial court's role as gatekeeper and has increased the risk of potentially unreliable testimony being admitted into court. Finally, Part III explores potential changes that can be made to Utah Rule 702 to combat the problems accompanying the low admissibility standard. One obvious approach is to revert to the federal rule, which would come with many advantages. Yet there would remain the problem of how then to treat years of Utah precedent. This Note proposes a better, and encouragingly simple, solution: that Utah make a minor alteration to Utah Rule of Evidence 702 that will allow the courts to get out from under flawed precedent and give them a blank slate for analyzing and interpreting the rule. The proposed change is to amend the rule by inserting words akin to "foundational reliability" in place of the "threshold showing" language in the current Utah rule. At

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[1] JACK B. WEINSTEIN ET AL., *Reliability and Fit of Expert Testimony*, *in* 4 WEINSTEIN'S FEDERAL EVIDENCE § 702.05, § 702.05 (2017).

[2] UTAH. R. EVID. 702.

[3] *See infra* Part II.

[4] *See infra* Part II.

[5] *See infra* Part II.

[6] UTAH. R. EVID. preliminary note.

least one other state uses such language and has produced sturdier caselaw to support its rule. This kind of change in Utah would decrease the risk of admitting unreliable testimony as well as reinstate the gatekeeper function without wholesale abandonment of prior Utah precedent.

I. BACKGROUND

A. Expert Witness Testimony in Federal Courts

1. The Frye *Test*

For nearly seventy years, federal courts in the United States applied the "*Frye* test" to determine admissibility of expert witness testimony.[7] In 1923, the D.C. Circuit ruled that for expert witness testimony to be admissible, the proponent must show that the underlying scientific method was "sufficiently established to have gained general acceptance in the particular field in which it belongs."[8] The *Frye* test gained popularity quickly, and the other federal circuits adopted the test.[9] Many States likewise followed suit.[10] This "general acceptance" test was the dominant standard in American evidentiary rulings until its proper scope and application became the subject of much public debate.[11] The test was criticized as being too broad and vague while being simultaneously too strict and too lenient.[12] Moreover, opponents of the *Frye* test argued that it was no longer valid because Rule 702[13] of the Federal Rules of Evidence, which had been enacted by Congress in 1975, had effectively superseded it.[14]

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[7] Alice B. Lustre, Annotation, *Post Daubert Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R. 5th 453, § 2 (2001).

[8] Frye v. United States, 293 F. 1013, 1013 (D.C. Cir. 1923).

[9] Lustre, *supra* note 7.

[10] *Id.*

[11] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 586 (1993).

[12] 3 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 7:10 (4th ed. 2017).

[13] *See generally* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen Years -- The Effect of "Plain Meaning" Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules*, 60 GEO. WASH. L. REV. 857 (1992) (discussing the continued validity of the *Frye* test following adoption of the Federal Rules of Evidence); *see also* Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States*, a Half-Century Later*, 80 COLUM. L. REV. 1197, 1250 (1980); Mark McCormick, *Scientific Evidence: Defining a New Approach to Admissibility*, 67 IOWA L. REV. 879, 883 (1982).

[14] Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1937 (codified as amended at FED. R. EVID. 702).

2. Daubert *as the Federal Standard*

In 1993, the Supreme Court considered whether the *Frye* test was still a workable standard or whether it had in fact been superseded by Rule 702.[15] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Court decided that it had been superseded.[16] At the time of *Daubert*, Rule 702 stated that "[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."[17] The Court determined that there was nothing in Rule 702 that established "general acceptance" as a strict prerequisite to admissibility.[18] Indeed, it felt a general acceptance requirement for expert testimony was "at odds with the 'liberal thrust' of the Federal Rules and their 'general approach of relaxing the traditional barriers to opinion testimony.'"[19] The Court then listed a "flexible" set of factors that courts should consider for determining admissibility in conjunction with Rule 702.[20] These factors include whether the scientific theory or technique (1) can be tested and falsified; (2) has been subjected to peer review and publication; (3) has a known or potential rate of error that is governed by standards; and (4) has general acceptance within the relevant scientific community.[21] "The crux of *Daubert* is that courts are to act as gatekeepers . . . and are to look directly at the proffered evidence and assess its validity and reliability."[22]

The Supreme Court addressed issues relating to Rule 702 two more times in the six years following *Daubert*. The first was in *General Electric Co. v. Joiner*, where the Court held that a traditional abuse of discretion standard was appropriate for reviewing Rule 702 evidentiary rulings and that appellate courts "may not categorically distinguish between rulings allowing expert testimony and rulings disallowing it."[23] In 1999, in *Kumho Tire Co., Ltd. v. Carmichael*,[24] the Court clarified that *Daubert* applies to all expert testimony, including *nonscientific* disciplines. *Kumho* also stands for the proposition that trial judges possess wide latitude in determining admissibility of evidence, and, rather than being limited to the factors in *Daubert*, they should assess reliability according to the "particular

[15] *Daubert,* 509 U.S. at 585.

[16] *Id.* at 587.

[17] Act of Jan. 2, 1975, Pub. L. No. 93-595, 88 Stat. 1926, 1937 (codified as amended at FED. R. EVID. 702).

[18] *Daubert*, 509 U.S. at 588.

[19] *Id.* (quoting Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 169 (1988)) (internal quotation marks omitted).

[20] *Id.* at 594–95.

[21] *Id.* at 593–95.

[22] MUELLER & KIRKPATRICK, *supra* note 12, § 7:10.

[23] Gen. Elec. Co. v. Joiner, 522 U.S. 136, 142 (1997).

[24] 526 U.S. 137 (1999).

circumstances of the particular case at issue."[25] Thus, along with the refinements of the rule laid out by *General Electric* and *Kumho*, *Daubert* remains the standard in federal evidence cases.[26]

3. Amendments to Federal Rule 702

In response to *Daubert*, the Court approved an amendment to Rule 702 in the year 2000.[27] The Advisory Committee Notes (ACN) state that the "amendment affirms the trial court's role as gatekeeper and provides general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony."[28] The general standards set forth in the amended Rule 702 are still listed in its current version:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.[29]

Daubert, as interpreted under the amended Rule 702, has since solidified its place in American jurisprudence as *the standard* in federal evidentiary rulings.[30] However, as *Daubert* based its ruling upon a federal statute and not the Constitution,

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[25] *Id.* at 150.

[26] MUELLER & KIRKPATRICK, *supra* note 12, § 7:10.

[27] *See* FED. R. EVID. 702 advisory committee's notes to 2000 amendment.

[28] *Id.*

[29] FED. R. EVID. 702. The rule as quoted is how it reads as of October 2017. The text of the rule after the 2000 Amendment was in a slightly different order than how the rule is written presently. The rule was amended in 2011 "as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes [were] intended to be stylistic only. There [was] no intent to change any result in any ruling on evidence admissibility." There was no change in the underlying text between the 2000 version of the rule and the 2011 version which is why the current version is quoted here. FED. R. EVID. 702 advisory committee's notes to 2011 amendments.

[30] *See* PAUL C. GIANNELLI ET AL., SCIENTIFIC EVIDENCE § 1.08 (Matthew Bender ed.) (5th ed. 2017); 1 CYRIL H. WECHT, FORENSIC SCIENCES § 19.05 (Matthew Bender ed.) (2018).

it was and still is, not binding on the States.[31] The States are, therefore, free to adopt the *Daubert* standard, continue to follow the *Frye* test, or follow some combination of the two.[32]

B. Expert Witness Testimony Under the Utah Rules

1. Utah's Adoption of the Federal Rules

Shortly after the United States Supreme Court approved the Federal Rules of Evidence, the Utah Supreme Court requested that the Utah State Bar Commission create a special committee to analyze whether the State of Utah should adopt the new Federal Rules of Evidence.[33] Under the Constitution of Utah,[34] and the Utah Supreme Court's statutory rulemaking power,[35] the committee later recommended adoption of the federal rules.[36] Following that recommendation, the State of Utah adopted the Federal Rules of Evidence in 1983 to "supply a fresh starting place for the law of evidence" but not to "present an ultimate end."[37] The State copied the federal rules verbatim, including Rule 702.[38]

2. Utah's Version of the Frye *Test*

One of the first cases at the Utah Supreme Court that tested the newly adopted Rule 702, and which became the standard for some time, was *State v. Rimmasch*.[39] There, the Court decided what standard to apply to evidentiary rulings on the admissibility of expert witness testimony,[40] particularly in light of the recent adoption of the federal rule and the State's prior case law on the issue.[41] The Court decided to "follow[] the modern trend and abandon[] exclusive reliance on *Frye*."[42]

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[31] GIANNELLI ET AL., *supra* note 30, § 1.11.

[32] *Id.*

[33] UTAH R. EVID. preliminary note.

[34] UTAH CONST. art. VIII, § 1.

[35] UTAH CODE § 78A-3-103 (2018).

[36] UTAH R. EVID. preliminary note.

[37] *Id.*

[38] State v. Rimmasch, 775 P.2d 388, 396 (Utah 1989) *superseded by rule*, UTAH R. EVID. 702, *as recognized in*, State v. Maestas, 299 P.3d 892 (Utah 2012).

[39] *Rimmasch*, 775 P.2d at 396.

[40] *Id.*

[41] *See*, *e.g.*, State v. Crosby, 927 P.2d 638, 640–42 (Utah 1996) (reviewing the court's rule 702 jurisprudence); Kofford v. Flora, 744 P.2d 1343, 1362 (Utah 1987) (Durham, J., concurring) (noting that for judicial notice of "inherent reliability" the proffered expert testimony must meet a very high level of reliability); Phillips v. Jackson, 615 P.2d 1228, 1234 (Utah 1980) (holding that "the admissibility of scientific evidence, while taking into account general scientific acceptance and widespread practical application, must focus in all events on proof of *inherent reliability*" (emphasis added)).

[42] *Rimmasch*, 775 P.2d at 396.

The Court followed the standard which was set out in *Phillips v. Jackson*, where "'inherent reliability' . . . became the touchstone of admissibility."[43] This inherent reliability analysis examined the "correctness of the principles underlying the scientific testimony, the accuracy and reliability of the methods utilized in application of the principles to the subject matter before the court, and the qualifications of the experts who gathered and analyzed the data."[44] The Court continued by explaining that "the purpose of a more restrictive test for judging the admissibility of scientific testimony is to assure, *as a threshold matter*, that the evidence is sufficiently reliable to go to the finder of fact."[45] The *Rimmasch* standard was a valuable principle of law, but it was later found to have been superseded by a puzzling amendment to Rule 702, which began the erosion of the gatekeeper function.

3. *Utah's Departure from* Daubert *and Introduction of the Threshold Standard*

The rule set forth in *Rimmasch* was the standard for admissibility of expert witness testimony in Utah for many years.[46] However, in 2007, Utah amended Rule 702, bolstering the idea of a "threshold showing" of reliability.[47] Courts have subsequently viewed *Rimmasch* as being superseded by the amended Rule 702,[48] which departed from its federal counterpart in several respects, the most prominent being the addition of the words "threshold showing." Utah Rule 702 now reads:

> (a) Subject to the limitations in paragraph (b), a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

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[43] *Id.*

[44] *Id.* at 410 (Durham, J., concurring).

[45] *Id.* at 396 (emphasis added) (citing Philips, 615 P.2d at 1233).

[46] *See, e.g.*, State v. Rothlisberger, 147 P.3d 1176, 1183 (Utah 2006) (noting the court has "required a certain level of reliability for novel expert evidence"); State v. Larsen, 865 P.2d 1355 (Utah 1993) ("[T]he question that must be posed prior to the admission of any expert evidence is whether, 'on balance, the evidence will be helpful to the finder of fact'" (quoting *Rimmasch*, 775 P.2d at 398 n.8)); State v. Iorg, 801 P.2d 938, 940 (Utah App. 1990) (noting expert testimony offered in the instant case was the type rejected by the Utah Supreme Court in *Rimmasch*).

[47] UTAH R. EVID. 702(b).

[48] *See*, *e.g.*, State v. Maestas, 299 P.3d 892, 930 n. 134 (Utah 2012) ("In amending rule 702, we intended 'to clarify the requirements for admission' of expert testimony and subsume the *Rimmasch* standard into rule 702." (quoting Eskelson *ex rel.* Eskelson v. Davis Hosp. and Med. Ctr., 242 P.3d 762, 766 (Utah 2010))); State v. Guard, 316 P.3d 444, 453 (Utah App. 2013) (noting the updated rule 702 "'subsume[s]' the *Rimmasch* test" (citing State v. Clopten, 223 P.3d 1103, 1114 (Utah 2009), (alteration in original) (*rev'd* 371 P.3d 1 (Utah 2015)).

> (b) Scientific, technical, or other specialized knowledge may serve as the basis for expert testimony *only if there is a threshold showing* that the principles or methods that are underlying in the testimony
> (1) are reliable,
> (2) are based upon sufficient facts or data, and
> (3) have been reliably applied to the facts.
> (c) The threshold showing required by paragraph (b) is satisfied if the underlying principles or methods, including the sufficiency of facts or data and the manner of their application to the facts of the case, are *generally accepted by the relevant expert community*.[49]

The ACN to the 2007 amendment states that, "[a]lthough Utah law foreshadowed in many respects the developments in federal law that commenced with *Daubert*, the 2007 amendment preserves and clarifies differences between the Utah and federal approaches to expert testimony."[50] The ACN further stated that trial judges should apply Rule 702 with "rational skepticism," but the "degree of scrutiny is not so rigorous as to be satisfied only by scientific or other specialized principles or methods that are free of controversy or that meet any fixed set of criteria fashioned to test reliability."[51]

Based on the amended rule and the ACN, the Utah rule has been cobbled together to retain bits and pieces of several tests. Section (a) of the amended rule, apart from the introductory language, still tracks the federal rule and is a remnant of the original federal rule from 1975.[52] As indicated by the ACN, the amended Utah rule is designed to apply to all evidentiary rulings consistent with the decision in *Kumho Tire*.[53] Yet, interestingly, section (c) of the amended Utah rule "retains limited features of the traditional *Frye* test for expert testimony."[54] And, as is most relevant to this Note, the Utah rule inserted the words "threshold showing" into section (b) of the amended rule.[55] The ACN clarifies that, "[*u*]*nlike* the federal rule . . . , the Utah rule notes that the proponent of the testimony is required to make *only* a 'threshold' showing."[56] These words have become particularly troublesome in Utah case law and have produced confusing and inconsistent results.

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[49] UTAH R. EVID. 702 (emphasis added). The Utah rule was also amended in 2011 "as part of the restyling of the Evidence Rules." UTAH R. EVID. 702 Advisory Committee Notes. The amendments were "stylistic only." *Id.* The major changes between Federal Rule 702 and the Utah rule occurred during the 2007 amendments to the Utah rules. *Id.*

[50] UTAH R. EVID. 702 Advisory Committee Notes.

[51] *Id.*; *see also* Eskelson *ex rel.* Eskelson v. Davis Hosp. & Med. Ctr., 242 P.3d 762 (Utah 2010).

[52] UTAH R. EVID. 702(a).

[53] UTAH R. EVID. 702 advisory committee notes.

[54] *Id.*; *see also* State v. Quintana, 103 P.3d 168 (Utah 2004).

[55] UTAH R. EVID. 702(b).

[56] *Id.* (emphasis added).

II. ISSUES CREATED BY UTAH'S MINIMAL THRESHOLD STANDARD

The 2007 amendment to Utah Rule 702, and in particular the addition of the threshold standard, has not only become a procedural conundrum for trial court gatekeepers, it has reduced evidentiary rulings to little more than a game of chance. Presumably, the amended rule emphasized a "threshold showing" as a holdover from *Rimmasch* where the Court said that district courts should determine the admissibility of expert testimony "*as a threshold matter.*"[57] Deciding something "as a threshold matter" commonly means making a decision firstly, preliminarily, or as a prerequisite to an action or event at a future date. This is not the case in Utah, however. The idea of a "threshold showing," at least under Utah's evidence law, has abandoned this common meaning. It now encapsulates the actual level of reliability of evidence rather than deciding whether the evidence *is* reliable *before* allowing it to go to the jury. As illustrated below, this level of reliability—which is now described as a threshold level—is closer to a de minimis standard teetering on the edge of being no real standard at all.

A. *The Diminishing Role of Utah's Gatekeepers*

Since the amendment, state trial courts are left with a vague and ill-defined standard for determining when proffered expert witness testimony has crossed the elusive line of admissibility. Based on language from post-amendment cases[58] that have diminished the threshold showing of reliability, trial judges are now compelled to give the benefit of the doubt to the experts and admit evidence even when there is little more than the *ipse dixit* of the expert. This Note does not attempt to disregard the importance of defining the roles between the triers of fact and law, but as the line of post-amendment cases shows, the gatekeeper function of Utah's judges has eroded almost to obsolescence. Below are analyses of three Utah cases that illustrate the diminishing role of the trial court gatekeepers. In all three, the trial courts, who were inevitably more intimate with the facts of each case, concluded that the expert witness opinions were *unreliable* only to be reversed because of Utah's minimal threshold standard.

[57] State v. Rimmasch, 775 P.2d 388, 396 (Utah 1989).
[58] *See infra* Parts II.A.1–3.

1. The Beginning of the End with Eskelson

The first significant Utah case[59] that applied the amended Rule 702 was *Eskelson v. Davis Hospital*[60] in 2010. As noted previously, Rule 702(b) stipulates that for evidence to be admissible, it must meet three criteria in light of the threshold standard.[61] The principles and methods underlying the testimony must be reliable, based upon sufficient facts or data, and reliably applied to the facts.[62] In *Eskelson*, the father of a child who had suffered a perforated eardrum sought to introduce the expert testimony of a medical doctor to show that the treating physician had departed from the standard of care while trying to extract a foreign object from the child's ear.[63] The defense moved to strike the testimony claiming it failed to meet the threshold requirements of Rule 702.[64] The district court granted the motion to strike and found that the testimony did not comply with Rule 702 because the expert physician's "testimony was not based on any scientific, technical, or other scientific knowledge, that his testimony would not assist the trier of fact, and that his methods were not generally accepted by the relevant scientific community."[65] Indeed, the physician could not even articulate any scientific methodology.[66]

On appeal, the Utah Supreme Court—in an opinion that produced more questions than answers—reversed, using a 702(b) analysis.[67] First, the Court analyzed the district court's decision under 702(b)(1).[68] It determined that despite the district court's finding that the physician had employed little science in producing his testimony, his prior experience as a doctor satisfied Utah's minimal threshold standard.[69] The only rationale the Court offered to support its decision was that the physician "had experience with the removal of foreign objects from the ears of children," which alone "satisfie[d] the threshold showing that [the physician's]

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[59] One year earlier, the Utah Supreme Court decided *State v. Clopten*, 223 P.3d 1103 (Utah 2009), but the defendant in that case had been convicted prior to the 2007 amendment to rule 702. The court analyzed the case under the previous rule as well as the amended rule, but the holding in that case only related to eyewitness expert testimony. This Note does not address the holding in *Clopten* nor does it analyze evidentiary rulings of eyewitness testimony.

[60] Eskelson *ex rel.* Eskelson v. Davis Hosp. & Med. Ctr., 242 P.3d 762 (Utah 2010).

[61] UTAH R. EVID. 702(b).

[62] *Id.*

[63] *Eskelson*, 242 P.3d at 764.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 766.

[67] *Id.*

[68] *Id.* at 766–67.

[69] *Id.*

testimony was reliable."[70] In essence, the Court decided that, because the doctor had seen similar situations before, his testimony was good enough.[71]

Next, the Supreme Court concluded that the expert's opinion also satisfied the requirements of 702(b)(2).[72] The district court had found that the expert did not base his testimony on sufficient facts and data because he had "selectively relied on only certain testimony" to form his opinion.[73] It had found that the physician "chose to believe only facts in the record that supported his argument that [the other physician] caused the injury while disregarding testimony that [the child] was tearful and whiney before he arrived" at the hospital.[74] Nonetheless, the Supreme Court again found this to be erroneous and stated that, "[a]lthough an expert cannot give opinion testimony that 'flies in the face of uncontroverted physical facts also in evidence,' an expert can rely on his own interpretation of facts that have a foundation in the evidence, even if those facts are in dispute."[75] The Court reasoned that, "once [the physician's] testimony is admitted at trial, [the defense] will have the opportunity to explore the factual basis for [the physician's] testimony and point out the dispute over the facts on which he relies."[76] While factual disputes admittedly can be pointed out at trial, Rule 702 requires that the testimony first be reliable before it even makes it to trial.[77] The process of cherry-picking evidence and then forming an expert opinion from that evidence is hardly a method that is "based upon sufficient facts or data."[78]

Finally, the Court also ruled that the physician's testimony was admissible under 702(b)(3).[79] Eskelson's physician testified that, because of his specialized knowledge, he knew a sudden instance of pain normally accompanies the perforation of an eardrum.[80] The physician had analyzed the evidence and "identified [the treating physician's] examination as the point in time when this sudden instance of pain occurred."[81] The Court stated in conclusory fashion that "[t]his testimony clearly applies [the physician's] specialized knowledge to the facts in evidence in a way that satisfies the threshold showing of reliability required by rule 702."[82] Here again, the Supreme Court resorted to the experience of the expert only and deemed

[70] *Id.*

[71] *Id.* ("Dr. Bateman's testimony regarding his experience as a physician, in dealing with similar situations as Jacob's, constitutes a threshold showing of reliability.").

[72] *Id.* at 767.

[73] *Id.*

[74] *Id.* at 766.

[75] *Id.* at 767 (quoting Yowell v. Occidental Life Ins. Co., 110 P.2d 566, 569 (Utah 1941)).

[76] *Id.*

[77] UTAH R. EVID. 702.

[78] *Id.*

[79] *Eskelson*, 242 P.3d at 767–68.

[80] *Id.* at 768.

[81] *Id.*

[82] *Id.*

it reliable enough. This case aptly illustrates the beginning of the end of Utah's gatekeepers. The trial court fulfilled its role as gatekeeper to screen out unreliable testimony. However, the Supreme Court of Utah held that the applicable standard for a threshold showing is lower than that applied by the trial court and reversed the exclusion of the expert testimony. Other than explaining that the standard for a threshold showing is low, the Court set binding precedent with little guidance about the right balance for gatekeepers to strike.

2. Gunn Hill Dairy *Continues the Trend*

Two years later, the Utah Court of Appeals took its turn in revealing the low bar of the threshold standard when it decided *Gunn Hill Dairy Properties v. L.A. Department of Water & Power*.[83] A group of dairy farmers sued the owners of an electrical power transmission company, alleging that high mortality rates and low milk production in their livestock resulted from stray current produced by the power company.[84] Plaintiffs had hired an electrician to conduct electrical testing near their farms, and the electrician "detected high levels of stray DC [current]."[85] Following this discovery, the electrician told a group of nearly one hundred local dairy farmers that "local dairy herd deaths and disease levels were 'too high' because of the stray electricity."[86] Subsequently, the plaintiffs hired counsel, electrical and power plant engineering experts, and other experts and sued the defendant power company.[87] The defendant promptly moved to exclude the opinions of the plaintiffs' experts.[88] After a five-day evidentiary hearing, the district court issued an order to exclude the evidence concerning stray current.[89] It articulated four reasons for excluding the testimony.[90] First, the expert's "statements regarding symptoms contradicted the Merck Veterinary Manual."[91] Second, the expert "failed to perform adequate differential diagnosis testing on each individual dairy farm."[92] Third, the expert's epidemiological study was flawed.[93] And fourth, the expert could not "establish causation based on an epidemiological study because such a study is used to

[83] Gunn Hill Dairy Props., LLC v. L.A. Dep't of Water & Power, 269 P.3d 980 (Utah Ct. App. 2012).
[84] *Id.* at 983.
[85] *Id.*
[86] *Id.*
[87] *Id.* at 983–84.
[88] *Id.* at 984.
[89] *Id.*
[90] *Id.* at 984–85.
[91] *Id.*
[92] *Id.*
[93] *Id.*

establish association, not causation."[94] The plaintiffs appealed, arguing that the district court misinterpreted amended Rule 702.[95]

On review, the Court of Appeals set binding precedent that again significantly lowered the bar for admissibility. It concluded first that, despite the Merck Veterinary Manual's stating that "controlled studies have *not* shown that stray current causes the aforementioned problems,"[96] the district court—even after a *five-day* evidentiary hearing—had simply "confused the concepts of *diagnosis* with *effects* of stray current."[97] Second, despite the trial court's finding that the expert failed to perform thorough investigations, the Court of Appeals decided the evidence was admissible because "the fact that his testing was superficial at some farms does not make the evidence inadmissible," but "it may lessen the value of his expert testimony."[98] Third, the Court of Appeals felt that, despite the flaws in the expert's testimony and methodology, the evidence should nevertheless be admitted "because no epidemiological study is flawless."[99]

The bottom line is that the Court of Appeals was only following precedent. It relied on the fact that Utah's threshold standard "requires *only a basic foundational showing of indicia of reliability* for the testimony to be admissible."[100] Of course, the Court of Appeals should not bear full responsibility for issuing a standard that is merely a hiccup. It was merely following the ACN, and the "threshold showing" language had already been indelibly written in the books.

The Court continued its reasoning by noting that "the line between assessing reliability and weighing evidence can be elusive" and that the court only plays a preliminary role because "the factfinder bears the ultimate responsibility for evaluating the accuracy, reliability, and weight of the testimony."[101] It further explained that when a court seeks to evaluate the weight of expert testimony rather than its threshold liability, it risks going beyond the scope of its gatekeeper responsibility and "into the factfinder's territory."[102]

That said, this decision highlights precisely the problem with Utah's Rule 702 cases—that the rule conflates the preliminary role of assessing reliability with

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[94] *Id.* For several reasons the trial court also concluded the expert's opinion regarding damages unreliable and therefore inadmissible. "The court permitted [the expert] to render certain other opinions." *Id.*

[95] *Id.* at 985.

[96] *Id.* at 992.

[97] *Id.* at 992–93.

[98] *Id.* at 993.

[99] *Id.* at 994.

[100] *Id.* at 993 (quoting UTAH R. EVID. 702 Advisory Committee Notes); *see also* State v. Sheehan, 273 P.3d 417, 425 (Utah Ct. App. 2012) ("[W]hile the trial court acts as a gatekeeper to keep expert evidence that is not reliable from the fact finder, this threshold determination does not extend to exclude contradictory evidence.").

[101] Gunn Hill Dairy Props., LLC v. L.A. Dep't of Water & Power, 269 P.3d 980, 995 (Utah Ct. App. 2012).

[102] *Id.*

determining the actual level of reliability. Deciding evidence is reliable enough to pass a wisp of threshold is not the same as preliminarily deciding evidence actually is reliable. While it is proper that the court be limited to a preliminary role only, and for the factfinder to ultimately weigh the evidence, Utah's gatekeepers should not be required to divine some elusive and ethereal line in their preliminary responsibility of "screen[ing] out unreliable expert testimony."[103] The gatekeeper's job is to make sure that *only reliable* testimony is placed at the feet of the finder of fact.[104] Again, the district court in this case had good reason to exclude the testimony and even conducted a five-day evidentiary hearing before doing so, but the Court of Appeals was bound to reverse because of Utah's threshold standard precedent.

3. Finishing It Off with Majors

In a more recent case,[105] the Utah Court of Appeals again addressed whether expert testimony had met the threshold showing and again was compelled to reverse a trial court's decision because of the low standard. In *Majors v. Owens*,[106] the Majorses were involved in a car accident and allegedly suffered neck and back injuries because of it.[107] To support their claim, they hired physician experts to testify that the injuries were caused by the accident.[108] The defendants argued that the Majorses' experts did no more than establish a chronological relationship between the time of the car accident and the Majorses' alleged injuries.[109] The defendants then moved to exclude the testimonies of the Majorses' expert witnesses because their opinions were not based on any reliable facts or methodology.[110]

[103] Eskelson *ex rel.* Eskelson v. Davis Hosp. & Med. Ctr., 242 P.3d 762, 766. (Utah 2010); *see also Sheehan*, 273 P.3d at 435 ("[T]he trial court acts as a gatekeeper to keep expert evidence that is not reliable from the fact finder").

[104] *See Sheehan*, 273 P.3d at 435.

[105] *See* Majors v. Owens, 365 P.3d 165 (Utah Ct. App. 2015), *cert. granted*, 384 P.3d 1139 (Utah 2016). The Utah Court of Appeals has decided more recent evidence cases citing the amended Rule 702, but none more recent than *Majors* in determining if the threshold showing has been met. *See* State v. Yalowski, 404 P.3d 53, 59–61 (Utah Ct. App. 2017); ConocoPhillips Co. v. Utah Dep't of Transp., 397 P.3d 772, 775–77 (Utah Ct. App. 2017). Additionally, the Utah Supreme Court has addressed Rule 702 in recent cases. *See* State v. Griffin, 384 P.3d 186, 202–03 (Utah 2016) (holding that DNA evidence met the threshold standard); State v. Guard, 371 P.3d 1, 19 (Utah 2015) (holding that, under *Clopton*, eyewitness expert testimony requires a showing of reliability); State v. Clopten, 223 P.3d 1103, 1104–11 (Utah 2009).

[106] Majors v. Owens, 365 P.3d 165 (Utah Ct. App. 2015), *cert. granted*, 384 P.3d 1139 (Utah 2016).

[107] *Id.* at 166.

[108] *Id.*

[109] *Id.*

[110] *Id.*

The district court agreed and granted the motion.[111] It found that the treating physicians' opinions were unreliable and inadmissible under Rule 702.[112] It maintained that "an expert must do more than merely establish a chronological relationship between an accident and the patient's symptoms" and that the physician expert "reach[ed] assumptions based on chronology without any underlying analysis of the [Majorses'] prior medical problems."[113] They performed no independent analysis nor reviewed the Majorses' "significant medical histories as contributing or aggravating factors to their medical conditions."[114] The medical doctors even seemed "to acknowledge their complete failure to independently analyze other potential causes."[115] Based on this reasoning, the district court felt that "the jury would engage in speculation rather than fact finding"[116] and excluded the testimony.

Following the analysis set forth in *Eskelson*, the Utah Court of Appeals reversed the decision to exclude and held that the experts' testimony was admissible because it had met the threshold requirements of Rule 702.[117] It said that, "[a]lthough the foundation for the [experts'] opinions appears somewhat thin, . . . the district court's preliminary assessment of the [experts'] reliability displaced the role of the jury to evaluate the weight to be given to the evidence."[118] The Court further reasoned that while the expert opinions had weaknesses, the defense would "have the opportunity to expose and probe such weaknesses once the opinions [were] admitted at trial."[119] So again, a Utah appellate court felt that it had little choice but to reverse a trial court's decision to exclude expert witness testimony because Utah's threshold showing standard is more like a barely reliable standard than simply a threshold matter. As these three cases show, Utah's gatekeepers are not shielding the jury from much, if any, testimony. Utah's "reliability standard" has now become more a standard of almost no reliability.

B. The Risk of Admitting Unreliable Testimony Is Increased

Because Utah trial courts are required to find only a "basic foundational showing of indicia of reliability"[120] before admitting expert witness testimony, the risk is becoming increasingly great that unreliable testimony will make its way to the jury. As the above cases demonstrate, if a trial court decides that certain expert opinions are unreliable, they do so at the risk of being reversed by appellate courts

[111] *Id.*
[112] *Id.* at 167.
[113] *Id.* (alterations in original).
[114] *Id.*
[115] *Id.* at 167.
[116] *Id.*
[117] *Id.*
[118] *Id.* at 172.
[119] *Id.*
[120] Gunn Hill Dairy Props., LLC v. L.A. Dep't of Water & Power, 269 P.3d 980, 993 (Utah Ct. App. 2012) (quoting UTAH R. EVID. 702 advisory committee notes) (emphasis omitted).

on the grounds that the minimal threshold standard was indeed met. What is the point of having gatekeepers if they are bound by statute and precedent to find nothing more than a shadow of reliability before deeming the evidence "reliable enough" for the jury to hear? Not to say that every time a trial court decides to exclude testimony, it will automatically be reversed by an appellate court. If, for example, the proffered expert were a random passerby having zero credentials and an opinion based on absolutely no scientific methods, and the trial court excluded the testimony, an appellate court would surely agree. But that does not change the fact that Utah's threshold standard has been getting weaker and weaker. As the standard continues to shrink, the risk of unreliable testimony reaching the jury increases. This brings with it its own set of issues, including juries engaging in excessive speculation, courts admitting "junk science," and cases being decided incorrectly by juries that were influenced by persuasive—yet unreliable—expert opinions.[121]

Although *Daubert* does not bind the States, the Supreme Court has clarified that an essential function of the gatekeeping responsibility is to "*ensure* that any and all scientific testimony or evidence admitted is not only relevant, but *reliable*."[122] The Utah Supreme Court echoed that idea when it said trial judges must, in their gatekeeper responsibility, "screen out unreliable expert testimony."[123] But how can trial courts meet their obligation to "screen out unreliable evidence" when binding precedent requires them to refrain from weighing the reliability of the evidence? Utah needs this Catch-22[124] standard to be corrected to give judges the ability to make meaningful decisions to exclude or admit expert testimony.

III. POTENTIAL CHANGES TO RULE 702

Utah Rule 702 needs amending. The line of cases applying the rule has done nothing more than establish that, in Utah, everything short of laughable makes it

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[121] *See, e.g.*, Best v. Lowe's Home Centers, Inc., 563 F.3d 171, 176–77 (6th Cir. 2009) ("*Daubert* attempts to strike a balance between a liberal admissibility standard for relevant evidence on the one hand and the need to exclude misleading 'junk science' on the other."); David L. Faigman, *The* Daubert *Revolution and the Birth of Modernity: Managing Scientific Evidence in the Age of Science*, 46 U.C. DAVIS L. REV. 893, 909–10 (2013) (explaining that *Daubert* was meant to "hold the line against junk science and . . . intended to tighten the rules of expert evidence"); N. J. Schweitzer & Michael J. Saks, *The Gatekeeper Effect: The Impact of Judges' Admissibility Decisions on the Persuasiveness of Expert Testimony*, 15 PSYCHOL. PUB. POL'Y & L. 1, 1, 13 (2009) (noting that a judge's decision to admit "junk science" would "endow[] that evidence with additional weight . . . .").

[122] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 586, 589 (1993) (emphasis added).

[123] Eskelson *ex rel.* Eskelson v. Davis Hosp. & Med. Ctr., 242 P.3d 762, 766 (Utah 2010).

[124] *Catch-22*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/catch-22 [https://perma.cc/HF5E-74WZ] (last visited July 28, 2018) ("circumstance or rule that denies a solution").

through the gate. The jury is not shielded from unreliable expert testimony, and the gatekeepers are all but ineffective. Deciding how the rule should be amended, though, is a much more difficult and challenging task. The first potential solution, and maybe the easiest to implement, is to adopt the current version of the federal rule. Embracing the federal rule, however, comes with its own challenges and may not prove workable under existing Utah precedent. Another solution would be to model a rule after the rules of other States that do not follow the federal rule. These alternatives are each discussed below.

A. Adopting the Current Version of Federal Rule 702

Adopting, verbatim, the current version of the federal rule comes with both advantages and disadvantages. The most significant difference between the federal rule and the Utah rule is the "threshold showing" requirement in subsection (b).[125] Another major difference is subsection (c) which exists only to explain the insertion of the minimal threshold standard.[126] If Utah were to adopt the Federal Rule 702, the threshold showing requirement in subsection (b) and the entirety of subsection (c) would no longer exist. The remaining text of the Utah rule is essentially the same as the federal rule.[127] The potential advantages of adopting the federal rule are at least twofold. First, Utah courts would enjoy greater efficiency in deciding cases because of the ability to tap into a large body of persuasive caselaw from which to draw analogous support. There are 108 federal courts in the U.S., comprised of ninety-four district courts, thirteen circuit courts, and the United States Supreme Court.[128] As it now stands, federal cases applying Rule 702 are wholly inapplicable to Utah cases as the two jurisdictions rely on entirely different standards. Because there are more cases dealing with Federal Rule 702, both in terms of the number of courts and length of time courts have been deciding cases under the rule, Utah courts would be able to more quickly locate and compare cases that have the same or similar fact patterns. Not only would the process of deciding expert witness testimony cases become more efficient, there would be less doubt as to which kind of evidence is admissible and which is not. Although the federal cases would not be binding on the

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[125] UTAH R. EVID. 702(b).

[126] UTAH R. EVID. 702(c).

[127] The mere deletion of subsections (b) and (c) in the Utah rule would not produce text that is *precisely* identical to the federal rule. As a result of the 2007 amendment to the Utah rule, certain words and phrases taken from the federal rule ended up in different subsections and sequences of the Utah rule. For example, the phrase "principles and methods" occurs twice in the federal rule and is retained in subsection (b) of the Utah rule immediately following the "threshold showing." *Compare* UTAH. R. EVID. 702 *with* FED. R. EVID. 702.

[128] Offices of the U.S. Attorneys, *Justice 101: Introduction to the Federal Court System*, U.S. DEP'T. OF JUSTICE https://www.justice.gov/usao/justice-101/federal-courts [https://perma.cc/35QL-ZJQN].

Utah courts, adoption of the federal rule would place a much greater body of caselaw at their fingertips.

Second, and more importantly, there would be a higher standard for admissibility, which would reduce the risk of admitting unreliable testimony. As pointed out above, Utah's threshold standard for reliability is easily cleared, and potentially unreliable testimony is more likely to be admitted because of it. The federal rule does not include the words "threshold showing."[129] The federal standard is higher than the Utah standard: The federal rule simply states that a qualified expert may testify if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact . . . ; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case."[130] Based on *Daubert*[131] and its progeny, trial judges must "ensure" that the "testimony or evidence admitted is not only relevant, but reliable."[132] The question in federal cases is not whether the expert testimony meets the "elusive"[133] and "somewhat thin"[134] threshold standard, but whether it is, in fact, reliable.

As with any change to an established law, there are disadvantages. The same is true of electing to adopt the current version of Federal Rule 702 in Utah. If Utah were to revert to the federal rule, the first question would be whether all the cases that applied the Utah rule as amended from 2007 to the present day are overruled or superseded by the rule change. That is over ten years of caselaw that may be invalidated or simply brushed under the rug. It is well-known that the "Court's authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction."[135] To throw out every Rule 702 case from the last ten years would not be wise. Therefore, adopting the federal rule while maintaining adherence to Utah precedent would be a tricky task indeed.

Another potential downside of adopting the federal rule is the possibility that too much expert testimony will be excluded from the jury. It is settled that "the factfinder bears the ultimate responsibility for evaluating the accuracy, reliability, and weight of the testimony."[136] If Utah's threshold standard has reached the point of letting too much in, the opposite could also become true if the threshold were raised: It could keep too much out. A reliability standard that is too high could tread "into the factfinder's territory."[137] Finally, there is also the possibility that trial court judges could abuse their gatekeeper responsibilities and exclude expert testimony too often. This, of course, could be corrected through the appeals process, but that

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[129] FED. R. EVID. 702.

[130] *Id.*

[131] Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

[132] *Id.* at 589.

[133] Gunn Hill Dairy Props., LLC v. L.A. Dep't of Water & Power, 269 P.3d 980, 995 (Utah Ct. App. 2012).

[134] Majors v. Owens, 365 P.3d 165, 172 (Utah Ct. App. 2015).

[135] Baker v. Carr, 369 U.S. 186, 267 (1962).

[136] *Gunn Hill*, 269 P.3d at 995.

[137] *Id.*

would still mean delaying final decisions and expending additional State and litigant funds to pursue interlocutory appeals. In sum, adoption of the federal rule may prove workable, but if Utah chooses this route, it needs to understand the problems that come with it, and it needs to be willing to live with those consequences.

B. Modeling Other States' Rule 702

Another option to consider for revamping Utah Rule 702 is to look at other States to see how they have treated their own rules of evidence post-*Frye* and *Daubert*. Twenty-five States have followed *Daubert* or adopted tests that are extremely similar,[138] and their respective rules on expert testimony essentially mirror the original federal rule.[139] Fifteen of the States have elected to continue to follow the traditional *Frye* test, and six States have not wholly or expressly rejected *Frye* but apply the *Daubert* factors.[140] Utah is one of the four remaining States that has developed its own evidence test.[141] Utah, however, is the only State in the nation that relies on a minimal "threshold" standard.[142] Other States have developed rules that closely resemble the Utah rule, absent the threshold language.[143] Utah could follow the example of those States, but doing so would have more or less the same impact as adopting the federal rule, which was discussed above.

The pros and cons identified in Section III.A above also apply if Utah were to emulate the rules of other States: To follow those rules could result in the overturning of years of Utah precedent and risk excluding previously admissible evidence. That could, in turn, disrupt the practices of many trial attorneys and trial judges that have become accustomed to Utah's minimal standard.

Perhaps the best solution is to amend the rule in such a way that would raise the threshold standard and restore the gatekeeping function of judges but do so discarding the "threshold" language. A promising amendment may look to the Minnesota expert witness rule.

Minnesota's rule on expert witness testimony begins by tracking the original federal rule, much like Utah's rule, but then adds the qualifier of "foundational reliability."[144] The rule reads:

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[138] *See* Lustre, *supra* note 7, §§3–53 (cataloguing whether each state applies *Daubert* or a similar test).

[139] *See, e.g.*, COLO. R. EVID. 702; IDAHO R. EVID. RULE 702; CONN. CODE EVID. 7-2; TENN. R. EVID. 702, 2001 advisory comm'n cmt. (affirming that, "[t]he *Frye* test no longer exists in Tennessee. In McDaniel v. CSX Transportation, Inc., 955 S.W.2d 257 (1997), the Tennessee Supreme Court listed five nonexclusive factors taken from the federal case of Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993)").

[140] *See* Lustre, *supra* note 7, §§8–53.

[141] *See id.* Georgia, Virginia, and Wisconsin are the other states that have developed their own separate tests. *Id.*

[142] *Id.* at § 51.

[143] *See, e.g.*, ARIZ. R. EVID. 702; FLA. STAT. TITLE VII § 90.702; MICH. R. EVID. 702.

[144] MINN. R. EVID. 702.

> 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. *The opinion must have foundational reliability.* In addition, if the opinion or evidence involves novel scientific theory, the proponent must establish that the underlying scientific evidence is generally accepted in the relevant scientific community.[145]

It may not be apparent from reading "foundational reliability" on the face of the rule that this verbiage bears any significant difference from the "threshold showing" language in the Utah rule. It is therefore essential to see how the Minnesota courts have interpreted this language. The Minnesota Supreme Court has stated that "foundational reliability 'requires the proponent of a . . . test [to] establish that the test itself is reliable and that its administration in the particular instance conformed to the procedure necessary to ensure reliability.'"[146] In 2006, Minnesota amended its Rule 702 and added the last two sentences now contained in the rule.[147] Like Utah's Rule 702(c), which is a remnant of the old *Frye* test, Minnesota's foundational reliability is also viewed through the *Frye* lens.[148] The main difference between Minnesota's standard and Utah's standard is one that concerns the *level* of reliability of the evidence. Where "threshold reliability" and "foundational reliability" may be viewed as synonymous semantically, the state courts' interpretations of their own respective rules expose the difference.

As noted, the Utah cases demonstrate that Utah appellate courts will likely reverse a district court's order excluding expert witness testimony because of the threshold standard is very low. Minnesota, on the other hand, has taken a more gatekeeper-friendly approach to their "foundational reliability" standard. In *Doe v. Archdiocese of Saint Paul & Minneapolis*,[149] the Minnesota Supreme Court upheld a district court's decision to exclude expert witness testimony because the testimony had not cleared the foundational reliability standard.[150] In that case, the expert for the plaintiff "presented 328 peer-reviewed scientific research articles purporting to show that repressed and recovered memory exists and that the theory is scientifically

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[145] *Id.* (emphasis added).

[146] Doe v. Archdiocese of Saint Paul & Minneapolis, 817 N.W.2d 150, 165 (Minn. 2012) (citation omitted) (internal quotation marks omitted).

[147] *Id.*

[148] *Id.* (the Minnesota Supreme Court noting that, "if the *Frye-Mack* standard applies, 'the particular scientific evidence in each case must be shown to have foundational reliability . . . .'").

[149] 817 N.W.2d 150 (Minn. 2012).

[150] *Id.* at 170.

reliable."[151] One of the experts testified that "repressed memories not only exist, but that, when recovered, those memories are accurate."[152]

In response, the defense presented an expert that opined that the "theory of repressed and recovered memory is 'highly controversial' and that '[s]ome have called it the most heated debate currently in psychiatry.'"[153] The expert for the defense felt the theory could not be "generally accepted in the relevant scientific community because something cannot be both generally accepted and highly controversial and debated."[154] The expert continued, saying that—notwithstanding their large quantity—the 328 articles presented by the plaintiff's experts were without merit because of methodological flaws.[155] The defense then moved to exclude the opinions of the plaintiff's experts.[156] After a three-day hearing on the admissibility of the testimony, the trial court concluded that the plaintiff's expert testimony had not reached the foundationally reliable standard, and the Supreme Court affirmed.[157] *Archdiocese* is not an isolated case in Minnesota, and it is evident from other cases[158] that Minnesota's version of "foundational reliability" is a higher standard than is Utah's. The expert opinion in *Archdiocese* would surely have been admitted had it been filed in Utah.

Minnesota's take, or a similar approach, on the standard of admissibility of expert witness testimony serves as a good model for Utah. If Utah amended Rule 702 to be similar to Minnesota's amended rule and interpreted the purpose of the rule to "ensure reliability" like the language in *Archdiocese*, [159] Utah would raise the admissibility standard and restore the gatekeeper function without compromising prior Utah precedent. This is because the "foundational reliability" language of the Minnesota rule is comparable to the language in the Utah rule and the consequences of adopting a Minnesota-like rule would be less disruptive of Utah precedent than simply adopting the federal rule. If Utah were to amend Rule 702 and give it slightly

[151] *Id.* at 157.

[152] *Id.*

[153] *Id.* at 158 (quotations omitted) (alteration in original).

[154] *Id.*

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *See, e.g.,* State v. Uldrych, No. A13-1792, 2015 WL 1013537 (Minn. Ct. App. Mar. 9, 2015) (affirming a trial court's decision to exclude expert witness testimony because it did not comply with procedural safeguards and controls); Zandi v. Wyeth, No. A08-1455, 2009 WL 2151141 (Minn. Ct. App. July 21, 2009) (upholding a district court's decision to exclude testimony because the proffered expert was unqualified and as a result, did not satisfy the foundational reliability test); Goeb v. Tharaldson, 615 N.W.2d 800, 811–14 (Minn. 2000) (affirming a trial court's decision to exclude expert testimony because the scientific methods employed by the expert lacked foundational reliability and general acceptance). *But see* State v. Obeta, 796 N.W.2d 282, 294 (Minn. 2011) (reversing a district court's decision to exclude expert witness testimony on other grounds and not ruling on whether the expert testimony had foundational reliability).

[159] *Doe*, 817 N.W. 2d at 164.

more teeth, requiring judges to ensure reliability prior to admitting expert testimony, Utah's threshold standard would be raised to an appropriate level.

CONCLUSION

In conclusion, Utah's Rule 702 on the admissibility of expert witness testimony is far too low. Utah trial courts cannot to fulfill their role as gatekeepers because the threshold standard forces them to admit almost everything without ensuring reliability. Accordingly, Utah evidence law will benefit from amending Rule 702 whether it reverts to the federal rule or elects the Minnesota approach. Either is preferred to the almost nonexistent standard currently in place, which has drifted far from the "inherent[ly] reliab[le]" tradition and is no longer "the touchstone of admissibility"[160] in Utah. The State should amend Rule of Evidence 702 to allow judges to make meaningful decisions on the admissibility of expert testimony once again.

[160] State v. Rimmasch, 775 P.2d 388, 396 (Utah 1989).