The Status of Expert Witness Testimony
in West Virginia – State and Federal Standards

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I. Introduction

The importance of expert witness testimony in all areas of litigation is undeniable, as jury determinations often hinge significantly on an expert's qualifications, opinions, and ability to convey those opinions in a manner understandable to a jury. The West Virginia state courts and the Fourth Circuit have both adopted standards through case law for the admissibility of expert witness testimony. While the federal scheme has adopted a uniform test for the admissibility of expert witness testimony, regardless of whether the testimony is rooted in scientific knowledge or not, West Virginia has thus far declined to follow suit.

II. Seminal Cases Governing the Fourth Circuit

A. Adoption of the *Frye* Standard

The federal stance on expert witness testimony initially adhered to the idea that if an individual was successful in an occupation or profession that incorporated knowledge of the topic or area at issue before the court, said individual qualified as having expertise in that field. *See* David L. Faigman, et al., *Check Your Crystal Ball at the Courthouse Door, Please: Exploring the Past, Understanding the Present, and Worrying About the Future of Scientific Evidence*, 15 Cardozo L. Rev. 1799, 1804 (1994). However, in 1923, a different standard was set forth by the Court of Appeals of the District of Columbia in the case of *Frye v. United States*, 293 F. 1013 (D.C. App. 1923). James Alphonzo Frye, who had been convicted of murder, appealed his conviction, alleging that the lower court committed reversible error in disallowing an expert witness testify on his behalf regarding a "systolic blood deception test" (i.e., a lie detector test). Mr. Frye was subjected to this test, and counsel for the defendant attempted to introduce the scientist who conducted the test as an expert to testify to the results obtained. *Id.* at

1013. Counsel for the government objected, and said objection was sustained by the trial court. *Id.* Counsel for Mr. Frye then offered to have the expert conduct a test in the presence of the jury, which was also denied. *Id.*

The Court held that "while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is to be made *must be sufficiently established to have gained general acceptance in the particular field in which it belongs*." *Id. (emphasis supplied)*. As such, the Court found that the "systolic blood pressure deception test" did not meet the "general acceptance" standard as it had not gained "such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made." *Id.*

B. Overruling *Frye*: *Daubert*

The *Frye* "general acceptance" test generally governed the admissibility of expert witness testimony in the federal jurisdiction for seventy (70) years, until 1993. The United States Supreme Court addressed the issue of admissibility of expert witness testimony in the landmark case of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). In that case, infants and their parents alleged that the infants' birth defects were caused by the mothers' prenatal ingestion of Benedectin, which was a prescription drug marketed by Merrell Dow Pharmaceuticals, Inc. The Plaintiffs-Petitioners presented testimony of eight (8) experts who testified that Benedectin can cause birth defects based on animal studies, chemical structure analyses, and the unpublished "reanalysis" of previously published human statistical studies. The District Court held that the experts presented by the Plaintiffs-Petitioners did not meet the *Frye* "general acceptance" standard for the admission of expert testimony. Therefore, the court

granted Defendant-Respondent's motion for summary judgment based upon an expert's affidavit concluding, upon reviewing the extensive published literature on the subject, that maternal use of Benedectin has not been shown to be a risk factor for human birth defects. The Court of Appeals agreed with the District Court's ruling and affirmed.

The United States Supreme Court reversed the lower courts' holdings and began the discussion of the issue of admissibility of expert witness testimony through identifying Rule 402 of the Federal Rules of Evidence as being the starting point. Rule 402 provides that all relevant evidence, defined by Rule 403 as that which has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," is admissible. *Id.* at 587. The Court proceeded to point out that Rule 702 of the Federal Rules of Evidence directly addresses the issue of expert witness testimony, stating, "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 opinion or otherwise." FED. R. EVID. 702. In declining to follow the *Frye* standard, the Court specified that nothing in the drafting history or text of Rule 702 provides that "general acceptance" is a necessary precondition to the admissibility of scientific evidence. *Daubert*, 509 U.S. at 588. Additionally, the Court noted that such a strict standard would be at odds with the liberal nature of the Federal Rules of Evidence, as well as "their 'general approach' of relaxing the traditional barriers to 'opinion' testimony." *Id.*, *citing Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988).

The Court specified that the Federal Rules of Evidence, specifically 702, provide the appropriate limits on the admissibility of allegedly scientific evidence by assigning the trial

judge the task of ensuring that an expert's testimony be both reliable and relevant. *Daubert*, 509 U.S. at 589. The reliability aspect included in Rule 702 requires that an expert's testimony pertain to "scientific . . . knowledge." *Id.* at 590 (footnotes omitted). "The adjective 'scientific' implies a grounding in the methods and procedures of science. Similarly, the word 'knowledge' connotes more than subjective belief or unsupported speculation. The term 'applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds.' " *Id.*, *citing* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1252 (1986).

The relevance aspect of Rule 702 requires the testimony to "assist the trier of fact to understand the evidence or to determine a fact in issue." FED. R. EVID. 702. Therefore, there must be a "valid scientific connection to the pertinent inquiry as a precondition to admissibility." *Daubert*, 509 U.S. at 580.

The Court held that a trial judge faced with a proffer of scientific testimony under Rule 702 is required to make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and can be properly applied to the facts at issue (i.e., reliable), pursuant to Rule 104(a). *Id.* at 593. Factors that can be taken into consideration include

> whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community.

Id. at 580.

The inquiry is flexible and its focus should be only on principles and methodology, not on the generated conclusions. *Id.* at 594-95. As such, the above checklist is not a definitive or exhaustive list. Finally, the Court explained that "cross-examination, presentation of contrary

evidence, and careful instruction on the burden of proof," are the appropriate means by which evidence based on valid principles may be challenged. *Id.* at 596.

C. Extension of *Daubert*: *Kumho*

The Court adhered to the *Daubert* standard until 1999, when the Court was presented with the case of *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). In that case, Mr. Carmichael was at the wheel of a vehicle whose tire blew out, causing the vehicle to overturn, which resulted in the death of one passenger and injuries to the other. Kumho Tire Co., Ltd. manufactured and distributed the defective tire on Mr. Carmichael's automobile, which Mr. Carmichael alleged was defective, resting his case largely on the deposition testimony of Dennis Carlson, Jr., a tire failure analyst. Mr. Carlson intended to testify that a defect in the tire's manufacture or design caused the blowout. The District Court, citing Rule 702 of the Federal Rules of Evidence and *Daubert*, held that Mr. Carlson's testimony did not meet the standard of reliability necessary as promulgated in *Daubert*. The Eleventh Circuit reversed the District Court holding that the court had committed reversible error and believed that *Daubert* applied only in a scientific context, while this case presented expert testimony reliant on skill or expertise, not science.

The United States Supreme Court reversed the Eleventh Circuit, holding that the factors set forth in *Daubert* may apply to the testimony of engineers and other experts who are not scientists. *Id.* at p. 141. The Court explained that the *Daubert* "gatekeeping" obligation (i.e., the reliability inquiry) applies to all expert testimony, not just that based on "scientific" knowledge, pointing out Rule 702 of the Federal Rules of Evidence does not distinguish between "scientific" knowledge and "technical" or "other specialized" knowledge, but instead makes clear that any such knowledge might become the subject of expert testimony. *Id.* at 147. *Daubert* referred

only to " 'scientific' testimony 'because that [wa]s the nature of the expertise' at issue." *Id.*, *citing Daubert*, 509 U.S., at 590, n. 8. The Court also noted *Daubert* specified that Rules 702 and 703 provide all witnesses, not only scientific ones, testimonial latitude unavailable to other witnesses on the assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline. *Kumho*, 526 U.S. at 148. The Court reasoned, "It would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. There is no clear line dividing the one from the others." *Id.*

The Court went on to state that a trial judge determining the admissibility of an engineering expert's testimony may consider one or more of the *Daubert* factors, stemming from the *Daubert* court characterizing the list as a "flexible" one. *Id.* at 153. The factors do not constitute a definitive checklist or test and the "gatekeeping" inquiry must be tied to the particular facts. *Id.* at 152. Those factors may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony. *Id.* In determining whether particular expert testimony is reliable, the trial court should consider the specific *Daubert* factors where they are reasonable measures of reliability. *Id.*

Therefore, the Court found that the District Court properly excluded Mr. Carlson's testimony because it initially doubted his methodology and then found it unreliable after examining the transcript in some detail and considering respondents' defense of it. *Id.* at 154. The doubts that triggered the court's initial inquiry were reasonable, as was the court's ultimate conclusion that Mr. Carlson could not reliably determine the cause of the failure of the tire in

question. *Id.* The question was not the reliability of his methodology in general, but rather whether he could reliably determine the cause of failure of the particular tire at issue. *Id.*

III. Seminal Cases Governing West Virginia

A. Adoption of the *Frye* Standard: *State v. Clawson*

West Virginia adopted the Frye "general acceptance" test in the case of *State v. Clawson*, 165 W. Va. 588, 270 S.E.2d 659 (1980). In that case, Mr. Clawson was charged and convicted of two (2) first degree murders. Defendant asserted, among other things, that expert testimony relating to hair samples was inadmissible because the chemist who testified as to the hair samples admitted that he did not have sufficient known samples from the victims to give an ultimate opinion, based upon a reasonable degree of scientific accuracy, that the hair samples found were the same as those taken from the personal possessions and clothing of the victims. *Id.* at 614, 675.

The West Virginia Supreme Court of Appeals held that the "trial court confronted with this problem should require some in camera disclosure of the test results and methodology in order to make an initial determination of whether the expert's testimony should be admitted." *Id.* at 622, 678. The Court also adopted the Frye "general acceptance" test in Point 7 of its syllabus, stating, "In order for a scientific test to be initially admissible, there must be general acceptance of the scientific principle which underlies the test." *Id.* at Syl. Pt. 7. Furthermore, the Court stated

> The necessary foundation before the admission of the results of any test are: (1) That the testing device or equipment was in proper working order; (2) that the person giving and interpreting the test was properly qualified; (3) that the test was properly conducted; and (4) that there was compliance with any statutory requirements.

Id. at Syl. Pt.9.

B. Overruling *Clawson* and Adopting *Daubert*: *Wilt*

West Virginia overruled the *Frye* "general acceptance" standard adopted and set forth by the Court in *Clawson* in *Wilt v. Buracker*, 191 W. Va. 39, 443 S.E.2d 196 (1993). Plaintiffs, husband and wife, sustained injuries when Charles Nickelson, Jr. struck their vehicle with his automobile. Mr. Nickelson died in the accident and Plaintiffs brought this action against Mr. Nickelson's estate. The primary reason for the appeal was to determine whether the testimony of an economist calculating a monetary amount of damages for the loss of enjoyment of life (i.e., "hedonic damages") was admissible evidence.

The West Virginia Supreme Court of Appeals held that the analysis of the United States Supreme Court in *Daubert* should be followed in analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence[1]. *Id.* at 46, 203. The Court provided:

> In analyzing the admissibility of expert testimony under Rule 702 of the West Virginia Rules of Evidence, the trial court's initial inquiry must consider whether the testimony is based on an assertion or inference derived from scientific methodology. Moreover, the testimony must be relevant to a fact at issue. Further assessment should then be made in regard to the expert testimony's reliability by considering its underlying scientific methodology and reasoning. This includes an assessment of (a) whether the scientific theory and its conclusion can be and have been tested; (b) whether the scientific theory has been subjected to peer review and publication; (c) whether the scientific theory's actual or potential rate of error is known; and (d) whether the scientific theory is generally accepted within the scientific community.

Id. at Syl. Pt. 2.

The Court held that the testimony offered by Plaintiffs' expert economist had no relevance to calculation of damages for loss of enjoyment of life, and that "loss of enjoyment of

[1] It should be noted that Rule 702 of the West Virginia Rules of Evidence mirrors Rule 702 of the Federal Rules of Evidence.

life resulting from permanent injury is part of general measure of damages flowing from the injury and is not subject to economic calculation." *Id.* at Syl. Pt. 4.

C. Clarification of *Wilt*: *Gentry*, the anti-*Kumho*

The West Virginia Supreme Court of Appeals revisited the issue of admissibility of expert witness testimony in *Gentry v. Mangum*, 195 W. Va. 512, 466 S.E.2d 171 (1995). In that case, Officer Gentry responded to a call about an individual roaming an area of Raleigh County carrying firearms on his person. After finding no one, he noticed a van with an expired inspection sticker and attempted to pull it over, but it sped away. The van eventually drove over an embankment, and when Officer Gentry exited his cruiser to investigate, he was shot once in his left hand and arm. As he attempted to retrieve a shotgun from the locked trunk of his vehicle, he was shot in his left leg. Plaintiffs instituted this action against Sheriff Mangum charging: the defendant knowingly promulgated and enforced a regulation that required the shotgun issued to Gentry be stored in the locked trunk of his police cruiser; implemented this regulation without conducting an adequate investigation into the hazards associated with the decision or without providing Raleigh County deputies, including Gentry, with adequate training in utilization and retrieval of shotguns locked in the trunks of police cruisers; and asserted the actions of the defendant satisfy the definition of "deliberate intent" found in the West Virginia Compensation Act, W. VA. CODE § 23-4-2 (1991), and entitled them to bring a "Mandolidis" action. During trial, Mr. Gentry sought to present expert testimony from Officer Charles Mader regarding the defendant's deliberate intent to harm Mr. Gentry. The circuit court ruled that Officer Mader had no special expertise in the subject matter that Mr. Gentry wished him to testify about. As such, Mr. Gentry appealed the circuit court's decision.

The Court in this case began its analysis by pointing out that "Rule 702 has three major requirements: (1) the witness must be an expert; (2) the expert must testify to scientific, technical or specialized knowledge; and (3) the expert testimony must assist the trier of fact." *Id.* at 524, 183 (footnotes omitted). The Court first addressed how to qualify an individual as an expert, stating that in order to determine an expert's qualifications, the circuit court must determine "whether the proposed expert (a) meets the minimal educational or experiential qualifications (b) in a field that is relevant to the subject under investigation (c) that will assist the trier of fact." *Id.* at 525, 184. The expert's area of expertise must also encompass the particular opinion that expert seeks to set forth in the case. *Id.*

Assuming the individual witness qualifies as an expert, and the expert's testimony is based on scientific, technical or specialized knowledge, the Court pointed out that Rule 702 and 104(a) require " 'a preliminary assessment of whether the reasoning or methodology underlying the testimony is *scientifically valid* and of whether that reasoning or methodology . . . properly can be applied to the facts in issue.' " *Id.* at 521, 180, *citing Daubert*, 509 U.S. at 593 (*emphasis supplied*). Said assessment would include the *Daubert* factors listed, such as testing ability, peer review and publication, potential rate of error, and general acceptance. *Daubert*, 509 U.S. at 593-94. The Court specified,

> *The problem is not to decide whether the proffered evidence is right, but whether the science is valid enough to be reliable*. When scientific evidence is proffered, the circuit court in its 'gatekeeper' role must engage in a two-part analysis in regard to the expert testimony. First, the court must determine whether the expert's testimony reflects "scientific knowledge," whether the findings are derived by "scientific method," and whether the work product amounts to "good science." Second, the circuit court must ensure that the scientific testimony is 'relevant to the task at hand.'

Gentry, 195 W. Va. at 523, 466 S.E.2d at 182 (footnotes omitted).

The Court differed from the eventual federal standard in finding that the question of admissibility under *Daubert* only arises if it is first established that the testimony deals with "scientific knowledge."

> The question of admissibility under *Daubert* . . . and *Wilt* . . . only arises if it is first established that the testimony deals with 'scientific knowledge.' 'Scientific' implies a grounding in the methods and procedures of science while 'knowledge' connotes more than subjective belief or unsupported speculation. In order to qualify as 'scientific knowledge,' an inference or assertion must be derived by the scientific method. It is the circuit court's responsibility initially to determine whether the expert's proposed testimony amounts to 'scientific knowledge' and, in doing so, to analyze not what the experts say, but what basis they have for saying it.

Id. at Syl. Pt. 6.

As such, if the expert testimony is not grounded in "scientific knowledge", admissibility of such testimony will revolve around the determinations of the relevancy of the evidence, i.e., whether the evidence will assist the trier of fact. A reliability analysis will not be required. *Wilt*, 443 191 W. Va. at 48, 443 S.E.2d at 203, n. 12 (recognizing that Rule 702 analysis "is concerned primarily with the relevancy of expert testimony", *quoting Gilman v. Choi*, 185 W. Va. 177, 179, 406 S.E.2d 200, 202 (1990)).

IV. After *Daubert*, *Kumho*, *Wilt* and *Gentry*: *Watson*

As is obvious, West Virginia state courts follow the federal scheme (i.e., *Daubert*) with respect to the issue of admissibility of expert testimony dealing with "scientific knowledge", defined as that testimony grounded in the methods and procedures, which is based upon more than a subjective belief or unsupported speculation. However, with respect to expert testimony not based upon "scientific knowledge", said testimony will be admitted in West Virginia state courts so long as it is relevant—therefore, no reliability analysis is necessary. The case law that

has been decided on the issue of admissibility of expert witness testimony continues to adhere to the standards promulgated by *Wilt* and *Gentry*. *See, e.g.*, *West Virginia Div. of Highways v. Butler*, 205 W. Va. 146, 516 S.E.2d 769 (1999); *Watson v. Inco Alloys Int'l, Inc.*, 209 W. Va. 234, 545 S.E.2d 294 (2001); *State ex rel. Wiseman v. Henning*, 212 W. Va. 128, 569 S.E.2d 204 (2002); *State v. Leep*, 212 W. Va. 57, 569 S.E.2d 133 (2002); *State ex rel. v. Weirton Medical Center v. Mazzone*, 213 W. Va. 750, 584 S.E.2d 606 (2003).

More importantly, the West Virginia Supreme Court of Appeals has continued apply the reasoning set forth in the *Gentry* case, even after the United States Supreme Court's decision in *Kumho*, as evidenced by its decision in *Watson*. In that case, Plaintiff's decedent was utilizing a "lifttruck" to load coils of wire onto a flat bed trailer when the lifttruck backed off the side of the tractor trailer and crushed Plaintiff's decedent. Plaintiff, decedent's wife, brought suit against several defendants, including the manufacturer of the lifttruck, alleging that the lifttruck was defectively designed. Plaintiff attempted to introduce expert testimony of Mr. John B. Sevart, a licensed engineer, in support of her contention that the lifttruck was defectively designed. The circuit court found that Mr. Sevart's testimony on the issues of design defects and the lack of adequate warnings could be characterized as scientific and therefore decided that the standards enumerated in *Wilt* and *Gentry* would apply. On appeal, the West Virginia Supreme Court of Appeals reversed the circuit court, holding, "Unless an engineer's opinion is derived from the methods and procedures of science, his or her testimony is generally considered technical in nature, and not scientific. Therefore, a court considering the admissibility of such evidence should not apply the gatekeeper analysis set forth by this Court" in *Wilt* and *Gentry*. Syl. Pt. 2, *Watson*, 209 W. Va. 234, 545 S.E.2d 294. It is important to note that while the Court referenced

"science" and the "scientific method" throughout its opinion, these terms are never fully explained. *See, e.g.*, *Id.* at 239, 299; *id.* at 240, 300.

V. Argument for Extension of *Kumho* in West Virginia

The call for the West Virginia Supreme Court of Appeals to reconsider and overrule the standard set forth by *Gentry* with respect to expert testimony not based upon "scientific knowledge," has increased, as evidenced by current Chief Justice Robin Jean Davis' law review article, *Admitting Expert Testimony in Federal Courts and Its Impact on West Virginia Jurisprudence*, 104 W. Va. L. Rev. 485 (2002). Chief Justice Davis'[2] rationale stems from the idea that adoption of the standards promulgated in *Kumho* "would not realistically present any new barrier to the admissibility of expert testimony that is based on technical or other specialized knowledge." *Id.* at 515. In support of this contention, she discusses the case of *Watson v. Inco Alloys Int'l, Inc.*, *supra*, providing that because the analysis set forth in *Daubert*, *Kumho*, *Wilt* and *Gentry* is flexible, there exists no strict set of factors that will apply in every scenario. *Id.* Therefore, because the factors may be tailored on a case by case basis, depending on the type of expert witness testimony sought to be admitted, the expert testimony in *Watson* "may very likely have been found reliable and admissible." *Id.*

In addition, it is important to recognize that where ambiguities exist in the law, inconsistency abounds, ultimately resulting in differing outcomes. Consistency is of paramount interest in our legal system. Due to the West Virginia Supreme Court of Appeals' resistance to the application of the *Daubert* factors to non-scientific testimony, courts are now presented with

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[2] Chief Justice Davis authored the *Watson* opinion, and it therefore logically follows that she has reconsidered her position with respect to this issue and now believes that the *Daubert* factors should be applied to any expert testimony, not just that grounded in the "scientific method", as the United States Supreme Court ruled in *Kumho*.

a much more difficult burden in deciding whether to admit expert opinions. As the Court in *Gentry* outlined, the circuit courts in West Virginia must now first determine whether the expert testimony is based upon "scientific knowledge." If it is, the test set forth in *Wilt* may be applied; however, if it is not, no reliability analysis is necessary, only decisions as to whether or not the expert is qualified and whether the testimony will assist the trier of fact (i.e., relevant). The Court in *Wilt* and *Gentry* provided that "scientific" refers to a grounding in the methods and procedures of science, and that "knowledge" refers to more than subjective belief or unsupported speculation. However, it is important to note that the Court thus far has not defined the term: "science." The Merriam-Webster Online Dictionary defines "science" as:

> **1:** the state of knowing: knowledge as distinguished from ignorance or misunderstanding
> **2a:** a department of systematized knowledge as an object of study **b:** something (as a sport or technique) that may be studied or learned like systematized knowledge
> **3a:** knowledge or a system of knowledge covering general truths or the operation of general laws especially as obtained and tested through scientific method **b:** such knowledge or such system of knowledge concerned with the physical world and its phenomena
> **4:** a system or method reconciling practical ends with scientific laws
>
> Merriam-Webster Online Dictionary, *available at* http://www.m-w.com/dictionary/science (last accessed April 3, 2007).

From the above definition, it would appear that nearly any area of study could be properly classified as being grounded in "scientific knowledge", as science has been defined simply as "the state of knowing." Additionally, the definition provides that a "sport" or "technique" studied or learned like systematized knowledge would fall under the classification of "science." As such, it is difficult to understand how an economist's testimony on hedonic damages (i.e., the issue presented in *Wilt*) would qualify as being grounded in "scientific

knowledge", whereas an engineer's testimony regarding the design of a vehicle (i.e., the issue presented in *Watson*) would not. Indeed, as the United States Supreme Court stated in *Kumho*,

> [I]t would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between 'scientific' knowledge and 'technical' or 'other specialized' knowledge. There is no clear line dividing the one from the others and no convincing need to make such distinctions. *Disciplines such as engineering rest upon scientific knowledge*.

Kumho, 526 U.S. at 148 (*emphasis supplied*).

Therefore, while the United States Supreme Court considers the field of engineering to rest upon scientific knowledge, the West Virginia Supreme Court of Appeals does not. Due to this obvious inconsistency, as well as the inevitable inconsistencies that will follow, West Virginia should adopt the *Daubert* factors with respect to all expert testimony, not just that which is scientific in nature, such as the United States Supreme Court did in *Kumho*.

VI. Conclusion

The West Virginia Supreme Court of Appeals should extend the factors set forth in *Daubert* and *Wilt* to testimony that is non-scientific in nature, just as the United States Supreme Court did in *Kumho*. As Chief Justice Davis explains, such an extension would not necessarily constrict expert witness testimony that is not scientific in nature as the analysis applied in *Daubert* and *Wilt* is a flexible one. In addition, the application of the *Daubert* and *Wilt* analysis to all expert testimony would keep judges from having to make an initial determination of whether an expert's testimony qualifies as being grounded in "scientific knowledge", which is a subjective inquiry that will otherwise lead to conflicting results and additional appeals to the West Virginia Supreme Court of Appeals, thereby reducing the efficiency and consistency of the legal system in West Virginia—a result we should all strive to avoid.