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A Misapplication of Daubert: Compton v. Subaru of America Opens the Gate for Unreliable and Irrelevant Expert Testimony

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A Misapplication of *Daubert: Compton v. Subaru of America* Opens the Gate for Unreliable and Irrelevant Expert Testimony

I. INTRODUCTION

"No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best."[1] This question, posed nearly a century ago by Judge Learned Hand, is still the subject of significant debate. Expert testimony can be a powerful tool that is often essential to understanding issues presented in court. Because this knowledge is usually difficult to evaluate, an expert's testimony has the potential not only to help the fact finder discover the truth, but also to mislead and misdirect the fact finder from ascertaining the truth.[2] Unfortunately, even after the Supreme Court's landmark decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[3] courts have continued to struggle in admitting and excluding expert testimony in a uniform and consistent manner.[4] A recent case decided by the Tenth Circuit, *Compton v. Subaru of America, Inc.*,[5] illustrates this struggle.

In *Compton*, a jury awarded nearly seven million dollars in damages to the plaintiff in an automobile accident. Much of the jury's award was attributed to the testimony of the plaintiff's sole design expert who opined that the accident vehicle's roof was defectively designed. This expert testified that based on his experience the roof should have sustained forces that the trial judge commented "seem[ed] more applicable to a Sherman tank than to any vehicle which the ordinary consumer would drive."[6] Arguably, the underlying methodology and core reasoning of the

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1. Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40 (1902).

2. *See* Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not Be Amended*, 138 F.R.D. 631, 632 (1991).

3. 509 U.S. 579 (1993).

4. *See* discussion *infra* Part II.C.

5. 82 F.3d 1513 (10th Cir.), *cert. denied*, 117 S. Ct. 611 (1996).

6. *Id.* at 1516.

expert's opinion was questionable and lacked reliability. However, the district court admitted the expert's testimony, and the defendants appealed claiming that the testimony should have been precluded under *Daubert*, in which the Supreme Court held that an expert's testimony must be reliable and relevant to assist the trier of fact.[7] Although this expert's testimony was arguably not based on any valid reasoning or methodology and should not have been admitted, district court judges have a significant amount of discretion in admitting expert testimony.[8] Therefore, *Compton*'s holding that the district court did not abuse its discretion is arguably valid as a matter of deferential review; however, the Tenth Circuit's reasoning as to how and when *Daubert* should be applied to expert testimony warrants a critical analysis.

On appeal, the Tenth Circuit held that *Daubert* was inapplicable because the expert based his opinion on his experience and training.[9] By so doing, *Compton* created a gaping loophole by which *Daubert*'s analysis may be circumvented and as a result opened the gate for the admissibility of unreliable and irrelevant expert testimony. The Tenth Circuit misapplied the standard and the reasoning set forth by the Supreme Court in *Daubert* and thus further clouded an area of the law that was already quite foggy. As one commentator noted: "Something seems awry. *Compton*'s rationale deserves a long, hard look before it becomes the order of the day."[10]

The *Compton* decision presents an opportunity to analyze how expert testimony should be examined by a trial court under *Daubert*. Part II of this Note discusses the evolution of the admissibility of expert testimony and presents the different approaches that federal courts have taken in applying *Daubert*. Part III discusses *Compton v. Subaru* and the reasoning the Tenth Circuit employed in deciding the case. Part IV analyzes the relationship between *Daubert* and Rule 702 of the Federal Rules of Evidence and explains how *Daubert* put a gloss on Rule

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7. *See infra* Part II.B.

8. *See* Wheeler v. John Deere Co., 935 F.2d 1090, 1100 (10th Cir. 1991) (recognizing that trial courts "are accorded broad discretion in determining the competency of expert witnesses").

9. *See Compton*, 82 F.3d at 1518.

10. Michael Hoenig, *New Cases on Experts After* "Daubert," 215 N.Y. L.J. 6 (1996).

702. *Daubert* instructs judges on how to apply Rule 702, and this Note explains how *Daubert* should be utilized when analyzing any expert testimony under Rule 702. Additionally, Part IV examines the difference between an expert's experience and methodology, explaining how the quality of an expert's experience and its application to the facts is all part of the expert's methodology. Part IV suggests an approach that the Tenth Circuit should have taken in applying *Daubert* to expert testimony. This suggested approach explains that to ensure that all expert testimony is reliable and relevant, *Daubert*'s intent and structure must remain intact by maintaining some objective indicia of reliability. While *Daubert*'s factors may be flexible in application, the requirement of sound reasoning and methodology must not be abandoned. Finally, Part V concludes by arguing that as a matter of policy, federal courts should apply *Daubert* to all expert testimony in a uniform yet flexible manner.

II. BACKGROUND: THE EVOLUTION OF ADMITTING EXPERT TESTIMONY

A. *Pre*-Daubert

Since at least 1620, experts have been called upon to assist litigants in their quest for equity.[11] Although expert testimony has been around for many years, the courts' standards for admissibility have changed over time. For seventy years prior to *Daubert*, expert testimony, and particularly scientific expert testimony, was governed by the "general acceptance" standard articulated in *Frye v. United States*.[12] In *Frye*, the defendant attempted to introduce evidence from a scientist who performed a systolic blood pressure deception test.[13] The court held that

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11. In 1620, physicians were called upon to testify in one of the first recorded cases involving expert testimony. The doctors testified that a woman who bore a child forty weeks and nine days after her husband's death, could have given birth to her husband's child at that time due to her illness and lack of strength. "[T]he court, agreeing with the physicians, delivered to the jury that it might be so." *See* Hand, *supra* note 1, at 45 (citing Alsop v. Bowtrell, Cro. Jac. 541).

12. 293 F. 1013, 1014 (D.C. Cir. 1923) ("[T]he thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.").

13. *See id.* at 1013 (denying the admittance of evidence by defendant who claimed his blood pressure would change according to the truthfulness of his

because the evidence was not generally accepted among the scientific community, the evidence was inadmissible.[14] This "general acceptance" test became the standard for determining whether expert testimony was admissible in federal and most state courts.[15]

In 1975, the Federal Rules of Evidence were adopted, and expert testimony was specifically addressed in Rule 702, which states:

> 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.[16]

Even after the adoption of the Federal Rules of Evidence, *Frye* continued to govern the admissibility of expert testimony in most courts. By 1993, ten of the thirteen federal circuits were still following *Frye*, and only three circuits held that the Federal Rules of Evidence superseded *Frye*.[17]

B. Daubert v. Merrell Dow Pharmaceuticals, Inc.

In 1993, the Supreme Court granted certiorari in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[18] "in light of sharp divisions among the courts regarding the proper standard for the admission of expert testimony."[19] The Court held that the *Frye* test was no longer applicable in admitting scientific evidence, and that the "*Frye* test was superseded by the adoption of the Federal Rules of Evidence."[20] As a result, district courts now look to

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testimony).

14. *See id.* at 1014.

15. The *Frye* test required courts to identify the relevant scientific community in which the underlying principle or methodology fell and determine whether that principle or methodology had been generally accepted by members of the identified community. *See* Paul C. Giannelli, *The Admissibility of Novel Scientific Evidence:* Frye v. United States, *a Half-Century Later*, 80 COLUM. L. REV. 1197, 1208-10 (1980).

16. FED. R. EVID. 702.

17. *See* United States v. Jakobetz, 955 F.2d 786, 794-97 (2d Cir. 1990); DeLuca v. Merrell Dow Pharms., Inc., 911 F.2d 941, 955 (3d Cir. 1990); United States v. Baller, 519 F.2d 463, 466 (4th Cir. 1975).

18. 509 U.S. 579 (1993).

19. *Id.* at 585.

20. *Id.* at 587.

Rule 702 and *Daubert* for guidance in admitting expert testimony.

Daubert was a products liability case involving the birth defects of two minor children. The defects were allegedly caused by their mother's ingestion of the prescription drug Bendectin.[21] The petitioners attempted to have evidence admitted from eight experts claiming that Bendectin could cause birth defects. The experts based their testimony on animal studies, chemical structure analyses, and the unpublished re-analysis of previously published epidemiological studies.[22] The district court, applying *Frye*'s "general acceptance" test, rejected the plaintiffs' expert testimony, and the Ninth Circuit affirmed.[23] However, the Supreme Court vacated the court of appeals' decision and remanded the case for proceedings consistent with its opinion.[24]

The *Daubert* decision requires federal trial judges to assume a "gatekeeping" role to guarantee that under Rule 702 an expert's testimony is "not only relevant, but reliable."[25] In order to meet the Supreme Court's mandate, a trial judge must use a two-prong test to determine the admissibility of expert testimony. First, the court must determine whether the expert's proposed testimony is scientific knowledge, and second, the court must determine whether the evidence "fits" the current issue and will assist the jury.[26] "This entails 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."[27]

To ensure that evidence is both reliable and relevant, the Court held that many factors will bear on this inquiry and suggested four specific observations: (1) whether the theory or technique underlying the evidence can be or has been tested, (2) whether it has been subjected to peer review and publication, (3) whether there is a known potential rate of error, and (4)

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21. *See id.* at 582.
22. *See id.* at 582-83.
23. *See* Daubert v. Merrell Dow Pharms., Inc., 951 F.2d 1128 (9th Cir. 1991), *aff'g* 727 F. Supp. 570 (S.D. Cal. 1989).
24. *See Daubert*, 509 U.S. at 598.
25. *Id.* at 589.
26. *See id.* at 592.
27. *Id.* at 592-93.

whether the theory or technique has been generally accepted.[28] *Daubert* has become the standard for the admissibility of expert testimony. However, while the rule in *Daubert* is easily articulated, its parameters are not so clear.

C. *Post*-Daubert

In order to determine whether an expert's reasoning or methodology was valid under *Frye*, deference was given to what the scientific field generally accepted. However, after the Supreme Court's decision in *Daubert*, judges now have the responsibility to act as "gatekeepers," analyzing the expert's reasoning or methodology to ensure the testimony is reliable and relevant. On remand, the Ninth Circuit noted that "[f]ederal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-*Daubert* world than before."[29] Requiring the courts to evaluate the reliability of expert testimony is a difficult task, which is further complicated by having to decide if and how *Daubert* should be applied to a variety of expert testimony. This complexity is illustrated by the different approaches taken among federal courts applying *Daubert* to expert testimony.

One of the most substantial issues left unresolved is whether *Daubert* applies to all areas of expert testimony allowed under Rule 702, or just to scientific expert testimony.[30] This issue has resulted in two approaches, which have split the circuits. Most courts have interpreted *Daubert* broadly, applying its analysis to scientific, technical, and specialized knowledge.[31] Some courts have taken a narrower approach

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28. *See id.* at 593-94. While the Court held that Rule 702 superseded *Frye*'s "general acceptance" test, *Daubert* did not entirely do away with *Frye*, but rather maintained "general acceptance" as one possible factor in the Court's new analysis.

29. Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1315 (9th Cir.), *cert. denied*, 116 S. Ct. 189 (1995).

30. *See* David L. Faigman, *Making the Law Safe for Science: A Proposed Rule for the Admission of Expert Testimony*, 35 WASHBURN L.J. 401, 422 (1996).

31. In *United States v. Markum*, the Tenth Circuit, applying *Daubert*, actually added the words "technical" and "specialized" to the language used in *Daubert*, holding that "the trial court must determine whether the expert is proposing to testify to (1) scientific, technical, or other specialized knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." 4 F.3d 891, 895-96 (10th Cir. 1993). This illustrates that for some courts, delineating between scientific, technical, and specialized knowledge is unnecessary because *Daubert* is applicable to all evidence that falls under Rule 702. The Sixth Circuit held that "[a]lthough . . .

and applied *Daubert* only to novel scientific testimony.[32] This

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Daubert dealt with scientific experts, its language relative to the 'gatekeeper' function of federal judges is applicable to all expert testimony offered under Rule 702." Berry v. City of Detroit, 25 F.3d 1342, 1350 (6th Cir. 1994) (finding that under *Daubert* a sociologist/former sheriff's testimony was neither reliable nor relevant to assist the trier of fact).

Many other federal courts have similarly applied *Daubert* to a variety of expert testimony. *See generally* Peitzmier v. Hennessy Indus., Inc., 97 F.3d 293, 297 (8th Cir. 1996) (holding that *Daubert* is not read so narrowly as to apply only to novel scientific expert testimony), *petition for cert. filed*, 65 U.S.L.W. 3539 (U.S. Jan. 29, 1997) (No. 96-1212); United States v. Hall, 93 F.3d 1337, 1341-47 (7th Cir. 1996) (requiring *Daubert*'s standards to be applied to a social scientist); Cummins v. Lyle Indus., 93 F.3d 362, 370 (7th Cir. 1996) (holding that an engineer who attempted to proffer evidence of alternative designs for a trim press was required to meet *Daubert*'s requirements for reliability); Pestel v. Vermeer Mfg. Co., 64 F.3d 382, 383-84 (8th Cir. 1995) (holding that *Daubert* applied to the testimony of a mechanical engineer); Deimer v. Cincinnati Sub-Zero Prods., Inc., 58 F.3d 341, 344-45 (7th Cir. 1995) (applying *Daubert* to exclude the testimony of an expert in a products liability case); Habecker v. Clark Equip. Co., 36 F.3d 278, 289-90 (3d Cir. 1994) (holding that *Daubert* was applicable to an insurance investigator); Marcel v. Placid Oil Co., 11 F.3d 563, 567-68 (5th Cir. 1994) (holding that an expert's testimony concerning work life expectancy of oil field workers could be excluded under *Daubert*); Frymire-Brinati v. KPMG Peat Marwick, 2 F.3d 183, 186-87 (7th Cir. 1993) (applying *Daubert* to the testimony of an accounting expert); *In re* Aluminum Phosphide Antitrust Litig., 893 F. Supp. 1497, 1505-07 (D. Kan. 1995) (holding that while all of *Daubert*'s factors may not be relevant in determining the reliability of expert testimony on nonscientific subjects, there is no doubt that *Daubert* requires district courts to act as gatekeepers to determine whether the expert's report and testimony is reliable and relevant under Rule 702); Williamson v. General Motors Corp., No. 1:93-cv-227-RHH, 1994 WL 660649, at *4-5 (N.D. Ga. Sept. 30, 1994) (holding that *Daubert* precluded an automotive expert from testifying concerning his theory that front-wheel-drive automobiles are more likely to hydroplane in wet conditions than rear-wheel-drive automobiles), *aff'd*, 67 F.3d 314 (11th Cir. 1995); Stanczyk v. Black & Decker, Inc., 836 F. Supp. 565, 566-67 (N.D. Ill. 1993) (holding that under *Daubert*, a mechanical engineer's opinion concerning a safer saw blade design was inadmissible).

32. In *Iacobelli Construction, Inc. v. County of Monroe*, 32 F.3d 19 (2d Cir. 1994), the Second Circuit ruled that *Daubert* is only applicable in cases involving scientific evidence. This case arose out of a construction dispute in which experts were called to testify concerning the industry practices and customs. The *Iacobelli* court held that these experts "do not present the kind of 'junk science' problem that *Daubert* meant to address." *Id.* at 25. Therefore, the court held that the district court's reliance on *Daubert* was misplaced and that "*Daubert* sought to clarify the standard for evaluating 'scientific knowledge' for purposes of admission under Fed. R. Evid. 702." *Id.*

Several district courts have followed this narrow approach and have applied *Daubert* only to evidence that meets the strict definition of "scientific knowledge." *See, e.g.*, Thornton v. Caterpillar, Inc., 951 F. Supp. 575, 578 (D.S.C. 1997) ("To apply *Daubert* factors to technical and specialized knowledge experts clearly misses the mark."); Edwards v. ATRO Spa, 891 F. Supp. 1074, 1082-84 (E.D.N.C. 1995) (holding that *Daubert* is applicable only to novel scientific evidence); United States v. Starzecpyzel, 880 F. Supp. 1027, 1030-44 (S.D.N.Y. 1995) (holding that *Daubert* is only applicable to scientific evidence); Officer v. Teledyne Republic/Sprague, 870 F.

conflict was foreseen by Chief Justice Rehnquist, who commented in his dissenting opinion:

> [C]ountless more questions will surely arise when hundreds of district judges try to apply [the majority's] teaching to particular offers of expert testimony. Does all of this *dicta* apply to an expert seeking to testify on the basis of "technical or other specialized knowledge"—the other types of expert knowledge to which Rule 702 applies—or are the "general observations" limited only to "scientific knowledge"?[33]

While the Supreme Court's discussion in *Daubert* was limited to the scientific context because that was the nature of the expertise offered,[34] the Court acknowledged that Rule 702 also applies to technical and other specialized knowledge.[35] Additionally, in a later footnote the Court held that "[a]lthough the *Frye* decision itself focused exclusively on 'novel' scientific techniques, we do not read the requirements of Rule 702 to apply specially or exclusively to unconventional evidence."[36] There is no doubt that Rule 702 applies to all types of expert testimony. The uncertainties arise as to how *Daubert* should be applied to the different types of expert testimony under Rule 702.

Although many courts have found *Daubert*'s analysis difficult—not only in application, but also in determining when applicable—the Tenth Circuit further complicated the issue in *Compton v. Subaru* by holding that it was unnecessary to reach the issue of whether *Daubert* applies to technical evidence because the application of *Daubert*'s analysis is unwarranted in cases where proffered expert testimony is based solely upon an expert's experience or training, or where no methodology is used.[37] By avoiding the issue of whether *Daubert* applies to all expert knowledge under Rule 702, *Compton* has moved beyond

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Supp. 408, 410 (D. Mass. 1994) (distinguishing between scientific and technical knowledge and holding that *Daubert* is not applicable to the later); Lappe v. American Honda Motor Co., 857 F. Supp. 222, 228 (N.D.N.Y. 1994) ("*Daubert* only prescribes judicial intervention for expert testimony approaching the outer boundaries of traditional scientific and technological knowledge."), *aff'd*, 101 F.3d 682 (2d Cir. 1996).

33. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 600 (1993) (Rehnquist, C.J., concurring in part and dissenting in part).

34. *See id.* at 590 n.8.

35. *See id.*

36. *Id.* at 592 n.11.

37. *See* Compton v. Subaru of Am., Inc., 82 F.3d 1513, 1520 (10th Cir.), *cert. denied*, 117 S. Ct. 611 (1996).

the issue debated by the other circuit courts and created another split among the circuits as to whether *Daubert's* analysis is appropriate when an expert's opinion is based on experience and not a specific methodology.[38]

III. *COMPTON V. SUBARU OF AMERICA, INC.*

A. The Facts

Having consumed several six-packs of beer among them,[39] Steven Compton and four other teenagers traveling in a 1982 Subaru GL Station Wagon set out for an evening of fun, which ended with a little more excitement than probably anticipated. As the teenagers were recklessly tailing Compton's ex-girlfriend on a Kansas highway, a passenger in Compton's vehicle reached over and yanked on the steering wheel causing the Subaru to enter a ditch and roll twice. Compton, who was not wearing a seat belt, suffered a spinal cord injury resulting in quadriplegia.[40]

Compton brought a products liability action against the vehicle manufacturer, Fuji Heavy Industries, Ltd., and the distributor, Subaru of America, Inc., claiming that the vehicle was defectively designed. Compton alleged that Subaru and Fuji were strictly liable for his injuries because there was an "excessive and extensive intrusion of the roof and side of the automobile into the passenger compartment during the rollover."[41] Compton further claimed that had the vehicle not been

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38. The Seventh Circuit recently criticized the *Compton* decision holding:

> [E]xpert testimony proffered under Fed. R. Evid. 104(a) for admission under Rule 702, must be tested to be sure that the person possesses genuine expertise in a field and that her court testimony "adheres to the same standards of intellectual rigor that are demanded in [her] professional work." At that level of generality, the *Daubert* framework is appropriate for all kinds of expert testimony; we do not agree with the Tenth Circuit's decision in *Compton v. Subaru of America, Inc.*, that it is limited to cases of novel scientific theories or methodologies. It is true, of course, that the measure of intellectual rigor will vary by the field of expertise and the way of demonstrating expertise will also vary.

Tyus v. Urban Search Mgmt., 102 F.3d 256, 263 (7th Cir. 1996) (citations omitted).

39. Compton had consumed an entire six-pack of six-percent beer. After the accident, the driver, who admitted to drinking four to five beers, plead guilty to driving under the influence. *See* Brief of Appellants at 3, Compton v. Subaru of Am., Inc., 82 F.3d 1513 (10th Cir. 1996) (No. 94-3429).

40. *See Compton*, 82 F.3d at 1516.

41. *Id.*

defectively designed, he would have avoided serious injury caused by the collapsed roof during the rollover.[42]

Compton's only design expert, a mechanical and aerospace engineer named Larry Bihlmeyer, testified that the roof support structures of the Subaru wagon were defective because they permitted excessive roof crush.[43] Mr. Bihlmeyer showed areas of the roof where he thought additional support was needed. Additionally, he opined that a properly designed roof should only allow two to three inches of roof crush, leaving thirty-three inches of headroom.[44] He testified that a vehicle should sustain forces between 48,000 and 71,000 pounds of pressure on the roof,[45] which is significantly stronger than that required by the federal standards.[46] The trial judge commented that Mr. Bihlmeyer's opinion "seems more applicable to a Sherman tank than to any vehicle which the ordinary consumer would drive."[47]

Mr. Bihlmeyer based his conclusions upon his inspection of the accident vehicle and an identical, undamaged Subaru wagon. He compared the headroom measurements in the accident vehicle with measurements that he compiled in hundreds of other accident vehicles that he examined as a consulting engineer. Mr. Bihlmeyer also relied on several automotive reports and proposals that indirectly related to his opinion.[48]

Prior to the full trial, Subaru and Fuji argued that Mr. Bihlmeyer was not qualified as an expert[49] and that his prof-

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42. *See id.*

43. *See id.*

44. *See id.* An undamaged 1982 Subaru has 34.5 inches of headroom over the left rear seat where Mr. Compton was seated. *See* Brief of Appellants at 7, Compton v. Subaru of Am., Inc., 82 F.3d 1513 (10th Cir. 1996) (No. 94-3429).

45. *See Compton*, 82 F.3d at 1516.

46. The federal roof-crush-resistance standard limits roof crush to no more than five inches at one and one half the vehicle weight, *see* 49 C.F.R. § 571.216 (1995), which would be 3,600 pounds. *See* Brief of Appellants at 2, Compton v. Subaru of Am., Inc., 82 F.3d 1513 (10th Cir. 1996) (No. 94-3429).

47. *Compton*, 82 F.3d at 1516.

48. *See id.* at 1516-17.

49. In their brief, the appellants pointed out that Mr. Bihlmeyer's background was in areas other than automotive roof design. Even when Bihlmeyer was at Ford, he worked in groups responsible for brakes, hydraulic lines, master cylinders, fluid level sensors, fuel systems, wheels, suspension, and steering. Although he was involved at one point in a group working on the roof, the group was concerned with the end use of the vehicle and placement of parts. The appellants further asserted that Bihlmeyer was never assigned to the body structure groups, arguing that he never conducted or

fered testimony did not meet *Daubert*'s test for admissibility. Although the district court acknowledged that it had an "*extremely low* opinion of Bihlmeyer's credibility and of the validity of his opinions,"[50] after a preliminary hearing,[51] the district court ruled that the expert was qualified, and the court allowed him to testify. The jury returned a $6,574,081 verdict for Compton, holding Subaru and Fuji fifty-six percent at fault.[52] Subaru and Fuji appealed on the ground that the district court erroneously admitted the testimony of Mr. Bihlmeyer, thus failing to carry out its gatekeeping role mandated under *Daubert*.[53] The Tenth Circuit affirmed the district court's decision and held that *Daubert* was inapplicable in this case.[54]

B. The Court's Reasoning

In an effort to explore the issues before it, the court reviewed the arguments made by both parties.[55] Subaru and Fuji contended that the district court erred in admitting Mr. Bihlmeyer's testimony under *Daubert*.[56] The appellants asserted that Bihlmeyer's testimony should have been excluded because it was neither reliable, relevant, nor grounded in any particular reasoning or methodology.[57] They argued that the expert did nothing more than give his personal opinion and did not rely upon industry data or any scientific principles or knowledge to support his conclusions. Furthermore, the appellants contended that Bihlmeyer's testimony should have been

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observed any rollover or roof crush tests and was unqualified to give his opinion as an expert in this case. *See* Brief of Appellants at 7-9, Compton v. Subaru of Am., Inc., 82 F.3d 1513 (10th Cir. 1996) (No. 94-3429). The appellate court held that "[a]s long as an expert stays 'within the reasonable confines of his subject area,' our case law establishes 'a lack of specialization does not affect the admissibility of [the expert] opinion, but only its weight.'" *Compton*, 82 F.3d at 1520 (quoting Wheeler v. John Deere Co., 935 F.2d 1090, 1100 (10th Cir. 1991)).

50. Compton v. Subaru of Am., Inc., No. 90-1088-MLB, slip op. at 7 (D. Kan. Nov. 15, 1994).

51. Rule 104 of the Federal Rules of Evidence allows for preliminary questions concerning the admissibility of evidence and the qualifications of a witness to be conducted before trial and outside the presence of the jury.

52. *See Compton*, 82 F.3d at 1517.

53. *See id.* at 1515-16.

54. *See id.* at 1521.

55. The *Compton* court held that "[t]he applicability of *Daubert* is a question of law which this court reviews *de novo*." *Id.* at 1517.

56. *See id.*

57. *See id.*

excluded under *Daubert* because there was no peer review, no testing, and no evidence of general acceptance concerning Bihlmeyer's theory.[58]

In contrast, Compton argued that *Daubert* was inapplicable to the proffered expert testimony. Compton asserted that Mr. Bihlmeyer's testimony was nonscientific, and furthermore, his conclusions were not based on the methods and procedures of science, but rather based on his own experience and expertise. Additionally, Compton contended that the *Daubert* factors (rate of error, peer review, and general acceptance) were inapplicable to the engineering testimony of Mr. Bihlmeyer.[59]

The *Compton* court began its analysis by acknowledging that Rule 702 governs the admissibility of expert testimony. The court held that "[t]he Supreme Court's decision in *Daubert* now mandates a further Rule 702 inquiry under certain circumstances."[60] The court then quoted the following language from *Daubert*:

> "[T]he trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails 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."[61]

The *Compton* court also recognized *Daubert*'s factors,[62] and acknowledged that a court's focus "'must be solely on principles and methodology, not on the conclusions that they generate.'"[63]

Then, without a great deal of explanation, the *Compton* court concluded that "the district court erred in its application of *Daubert* in this case."[64] The court reasoned: "The language in *Daubert* makes clear the factors outlined by the Court are applicable only when a proffered expert relies on some principle or

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58. *See id.*
59. *See id.*
60. *Id.* at 1518.
61. *Id.* (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-93 (1993)).
62. *See supra* text accompanying note 28.
63. *Compton*, 82 F.3d at 1518 (quoting *Daubert*, 509 U.S. at 595).
64. *Id.* at 1519.

methodology. In other words, application of the *Daubert* factors is unwarranted in cases where expert testimony is based solely upon experience or training."[65]

The court held that in cases such as this, where *Daubert* is inapplicable, a district court is only bound by Rule 702 to ensure expert testimony is both relevant and reliable.[66] Although the court held that the district court erred in applying *Daubert*, the court nevertheless affirmed the lower court's decision because it felt the district court fulfilled its responsibility under Rule 702.[67] Apparently, this Tenth Circuit panel felt that an expert qualified under Rule 702 by experience and training should be allowed to present his testimony to the jury. While not articulated within the opinion, the court seems to have stated that admissibility and reliability are two distinct concepts—admissibility for the judge, and reliability for the jury.[68]

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65. *Id.* at 1518. In an effort to validate this statement, the *Compton* court cited *United States v. Rice*, 52 F.3d 843, 847 (10th Cir. 1995), stating that only a traditional Rule 702 analysis was necessary where an expert bases his testimony on personal experiences. *See Compton*, 82 F.3d at 1518-19. The *Compton* court asserted that *Rice* cited *Daubert* but applied the traditional Rule 702 test. However, a fair reading of *Rice* suggests that the *Rice* court actually considered and applied a *Daubert* analysis. The *Rice* court quoted both *Daubert* and Rule 702, and then held: "Applying the appropriate tests, . . . [the expert's] testimony was to be based entirely on pure surmise. . . . Thus, we believe the trial court properly disallowed his testimony under Rule 702." *Rice*, 52 F.3d at 847. The *Rice* court gave no indication that it did not apply *Daubert* in reaching its conclusion; in fact, the court appeared to apply the logic of *Daubert* to ensure that the testimony was relevant. *See id.* Just because *Rice* did not list the factors outlined in *Daubert* does not necessarily suggest that the court did not apply *Daubert*'s logic to assist in its Rule 702 analysis. Therefore, the support *Compton* gains from *Rice* is somewhat tenuous.

66. *See Compton*, 82 F.3d at 1519. In support, the *Compton* court cited several cases in which experts who based their opinions on their experience and training were allowed to testify. For example, see *United States v. Markum*, 4 F.3d 891 (10th Cir. 1993), in which a fire chief was allowed to testify concerning his personal observations, and *United States v. Muldrow*, 19 F.3d 1332 (10th Cir. 1993), in which a police officer was allowed to testify about drug trafficking. However, similar to the reliance on *Rice*, this reliance was misplaced. In both of these cases, the Tenth Circuit acknowledged *Daubert* and analyzed the expert testimony "'[u]nder the standard for Rule 702 announced in [*Daubert*].'" *Id.* (quoting *Markum*, 4 F.3d at 895-96). Then, satisfied that the proffered testimony was reliable, the court allowed the experts to testify under Rule 702. Furthermore, the testimony offered in *Rice*, *Markum*, and *Muldrow* was all substantially less complicated than the testimony offered in *Compton* and did not necessarily require all of *Daubert*'s factors to be applied.

67. *See Compton*, 82 F.3d at 1519.

68. *See* Thornton v. Caterpillar, Inc., 951 F. Supp. 575, 578 (D.S.C. 1997).

Additionally, the court held that because the expert's testimony was not based on any particular methodology, it was unnecessary to decide the issue of whether *Daubert* was applicable to Bihlmeyer's nonscientific testimony.[69] Thus, *Compton* precluded an inquiry as to whether *Daubert* extends to "technical or specialized knowledge" under Rule 702. The court reasoned: "Mr. Bihlmeyer reached his expert conclusions by drawing upon general engineering principles and his . . . experience . . . . Absent some particular methodology or technique, *Daubert* simply has little bearing on Mr. Bihlmeyer's testimony."[70]

IV. ANALYSIS

Unfortunately, the *Compton* court overlooked *Daubert*'s fundamental intention and opened the gate for expert evidence that is neither reliable nor relevant. By avoiding the application of *Daubert*, the *Compton* court admitted the expert's questionable testimony without inquiring into the methodology or reasoning underlying his conclusions, thus allowing the evidence to go to the jury simply because the expert claimed his opinion was based on his past experience and training. In fact, according to *Compton*, as long as an expert claims that he used no methodology his testimony escapes any *Daubert* analysis.

Compton's novel exception to *Daubert* may have a widespread effect on current litigation. Expert opinions are a necessary element of the adjudicative process, and issues concerning the reliability of expert testimony are continually recurring. Several district courts—in and out of the Tenth Circuit—have already cited *Compton* and applied its logic.[71] Although only

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69. *See Compton*, 82 F.3d at 1519. Furthermore, in response to an amicus brief in which the Product Liability Advisory Council urged the court to apply *Daubert* to all expert testimony, the court held that "we expressly decline to reach this issue." *Id.* at 1516 n.1.

70. *Id* at 1519.

71. *See generally* United Phosphorus, Ltd. v. Midland Fumigant, Inc., Nos. Civ. A. 91-2133-EEO, Civ. A. 95-2267-EEO, 1997 WL 38112, at *2-*3 (D. Kan. Jan. 24, 1997) (citing *Compton* and holding that a *Daubert* analysis is not implicated when an expert bases his testimony solely on experience and practical knowledge); *Thornton*, 951 F. Supp. at 578 ("'[T]he same Rule 702 analysis [applies] except in cases involving unique, untested, or controversial methodologies or techniques.'" (quoting *Compton*, 82 F.3d at 1519)); Gust v. Jones, No. 95-1129-JTM, 1996 WL 635703, at *6 n.3 (D. Kan. Oct. 30, 1996) (citing *Compton* and holding that *Daubert* is only applicable when an expert's testimony is based on a particular methodology or technique); Waitek v. Dalkon Shield Claimants Trust, 934 F. Supp. 1068, 1087-88

district courts in the Tenth Circuit are bound to follow *Compton*,[72] its logic could be far reaching, potentially affecting a host of other cases and setting forth damaging precedent.[73]

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n.10 (N.D. Iowa 1996) (relying on *Compton*'s logic and holding that *Daubert* was not applicable to a physician who relied on his experience and training); Liriano v. Hobart Corp., No. 94 CIV. 5279 (SAS), 1996 WL 304337, at *4-5 (S.D.N.Y. July 23, 1996) (applying *Compton*'s logic).

In *Liriano*, a New York district court admitted an expert's testimony under the *Compton* rationale in a case involving a defectively designed meat grinder. The court, quoting *Compton*, held:

> "[A]pplication of the *Daubert* factors is unwarranted in cases where expert testimony is based solely upon experience or training" as opposed to a particular methodology or technique. . . . I find the Tenth Circuit's reading of *Daubert* persuasive. Because [the expert's] testimony was based upon his experience and training in the established field of industrial safety, and not on any novel scientific method or technique, I find the *Daubert* analysis inapplicable.

Id. (citations omitted) (quoting *Compton*, 82 F.3d at 1518-19). However, the *Liriano* court acknowledged in a footnote that even if *Daubert* did apply, the expert opinion was relevant and drew upon established safety engineering principles and practices that have been documented in a variety of published studies. *Id.* at *5 n.1.

72. Those in the Tenth Circuit who are not pleased with the result of *Compton* may be able to rely on another Tenth Circuit case that was decided a few months later by another panel. Unlike the *Compton* court, in *Duffee ex rel. Thornton v. Murray Ohio Manufacturing Co.*, 91 F.3d 1410 (10th Cir. 1996), the court precluded an expert's testimony from being admitted into evidence by applying *Daubert* to testimony that was based on the expert's experience. The expert, a mechanical engineer, attempted to testify that a bicycle was defectively designed because it had rear-foot brakes instead of caliper-hand breaks. In forming this opinion, the expert relied on his own experience on bicycles, a conversation with a retail bicycle dealer, and his own rudimentary testing of bicycle stopping distances. *See* Duffee *ex rel.* Thornton v. Murray Ohio Mfg. Co., 879 F. Supp. 1078, 1086 (D. Kan. 1995), *aff'd*, 91 F.3d 1410 (10th Cir. 1996). The expert even conceded that he had reached his opinion without tracking the methodology or analysis that a reasonable bicycle manufacturer would use. *See id.* The Tenth Circuit adopted the district court's analysis, holding that "[h]e arrived at his conclusion with an incomplete and inadequate factual basis . . . [and that s]uch unsupported speculation lacks the validity demanded by *Daubert*." *Id.* at 1087.

If *Compton*'s reasoning had been employed, the court may have held that because no scientific methodology was used and the expert relied on his own experience, *Daubert* would not have applied and the testimony would have been admitted. For some reason, the Tenth Circuit had no problem applying *Daubert* to preclude questionable engineering expert testimony in *Duffee*; whereas, in *Compton* the court held that *Daubert* was inapplicable to similar testimony. Thus, *Duffee* created conflicting precedent within the Tenth Circuit.

73. While many see *Compton* as a case that permits unreliable expert testimony to be admitted, there are others who feel that *Daubert*'s requirements are too restrictive and look at the *Compton* decision as a victory in the expert testimony arena. A recent article in *Trial Magazine* stated that plaintiffs have a more difficult time finding and compensating experts who would qualify under *Daubert* and that the defense bar is using "'the *Daubert* defense' to skew the balance of 'expert power.'"

Because *Compton*'s reasoning circumvents a *Daubert* analysis and undermines the Supreme Court's intention that all evidence presented to the fact finder be reliable and relevant, *Daubert* and Rule 702 should be examined in an effort to understand what the applicable standard should be in admitting expert testimony based on experience and training. The following analysis will demonstrate that a uniform, yet flexible application of *Daubert* should be applied to all evidence brought under Rule 702, thus ensuring reliability and relevance.

A. The Relationship Between Rule 702 and Daubert

Evaluating an expert's testimony under Rule 702 can be difficult; however, *Daubert*, when applied appropriately, offers courts guidance in applying this rule. In order to give an expert opinion, Rule 702 requires that a witness qualify as an expert and possess knowledge that will assist the fact finder.[74] To confirm that an expert has knowledge and is offering more than a subjective belief or unsupported speculation—which is necessary to assist the fact finder under Rule 702—*Daubert* explained that a trial judge must ensure that "an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."[75] In order to ensure that the trier of fact is presented

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Larry E. Coben, *The* Daubert *Decision: Gatekeeper or Executioner?*, TRIAL, Aug. 1996, at 53, 53. In this article, the author argued that *Daubert* "does not apply where an expert's opinion is based on education and experience rather than scientific testing." *Id.* at 54. The plaintiff's bar may look at *Compton* as a victory because plaintiffs who once felt *Daubert* was an insurmountable barrier now have a loophole in which to avoid the rigors required under *Daubert*.

In a products liability case, for example, it may be difficult for a plaintiff, who may not have the financial backing that a defendant does, to obtain an expert who can develop reliable and relevant testimony that will satisfy the demands of *Daubert*. However, in response to one plaintiff's argument that it would cost too much if their expert were required to test alternative designs, a district court held that the very nature of Rule 702 and *Daubert* requires these expenditures. *See* Stanczyk v. Black & Decker, Inc., 836 F. Supp. 565, 568 (N.D. Ill. 1993). The court further held: "Proof of any kind is often expensive to gather. Scientific reliability and validity in our times is seldom cheap, but at least when once established it can be used again and again at little marginal cost." *Id.*

The distinction between the effect on plaintiffs and defendants seems futile. Both plaintiffs and defendants need reliable and relevant evidence. If a litigant argues that *Daubert* is inapplicable, he may as well be arguing that his methodology is not sound, it cannot be validated, and it will not assist the fact finder.

74. *See supra* text accompanying note 16 for text of Rule 702.

75. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993).

with evidence that meets this "reliable" and "relevant" threshold, *Daubert* instructed courts to assess the reasoning or methodology underlying the expert's testimony.[76] Following this analysis allows a trial court to assure itself that prior to admitting an expert's testimony, the "expert knows whereof he speaks."[77]

The *Compton* court asserted that *Daubert* is distinguishable from Rule 702 by holding *Daubert's* factors are unwarranted in cases where expert testimony is based solely on experience and training. In such situations, *Compton* held that "Rule 702 merely requires the trial court to make a preliminary finding that proffered expert testimony is both relevant and reliable."[78] In an ironic twist, the court in *Compton* used the words "relevant" and "reliable" from *Daubert*, yet failed to apply the Supreme Court's analysis. *Daubert* set up the structure and provided indicia for reliability, which should be applied when a court is presented with scientific, technical, or specialized knowledge under Rule 702.[79] The *Compton* court recognized

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76. *See id.* at 592-93.

77. Bammerlin v. Navistar Int'l Transp. Corp., 30 F.3d 898, 901 (7th Cir. 1994).

78. Compton v. Subaru of Am., Inc., 82 F.3d 1513, 1519 (10th Cir.), *cert. denied*, 117 S. Ct. 611 (1996).

79. Logically, *Daubert* should be applied to all expert testimony proffered under Rule 702. As one commentator noted: "[T]he *Daubert* opinion not only contains direct guidance to district judges on how to be gatekeepers of scientific testimony, but also lays the groundwork for extrapolating these principles to 'technical and other specialized knowledge.'" Linda Sandstrom Simard & William G. Young, Daubert's *Gatekeeper: The Role of the District Judge in Admitting Expert Testimony*, 68 TUL. L. REV. 1457, 1465 (1994). *Daubert* demanded that scientific knowledge be grounded "in the metheds and procedures of science." *Daubert*, 509 U.S. at 590. Therefore, any technical knowledge proffered should be grounded in the technological methods and procedures of the technical field. Furthermore, "the factors set out in *Daubert* with respect to 'scientific' testimony can be readily adapted to 'technical' testimony." *See* Hopkins v. NCR Corp., Civ. A. No. 93-188-B-M2, 1994 WL 757510, at *5 (M.D. La. Apr. 21, 1995) (holding that a fair reading of *Daubert* does not support the position that *Daubert* is limited to testimony based on scientific knowledge), *aff'd*, 53 F.3d 1281 (5th Cir. 1995). This reasoning is supported by the assertion that technical opinions offered by experts could be tested through similar methods and procedures employed to validate scientific theories. *See id.* Just as the intent of *Daubert* was to make sure that the science does the testifying and not the scientist, *see* Cavallo v. Star Enter., 100 F.3d 1150, 1159 (4th Cir. 1996), the technology or the specialized knowledge should do the speaking rather than the engineer or the specialist.

As one commentator stated: "Of course, *Daubert's* details apply to scientific knowledge because that was the context of that case. Its general methods and its discussion of controlling rules, however, apply to all types of specialized knowledge listed in Rule 702." G. Michael Fenner, *The* Daubert *Handbook: The Case, Its*

that Rule 702 requires that an expert's testimony must "'assist the trier of fact to understand the evidence or to determine a fact in issue.'"[80] However, to fulfill this purpose, the testimony offered must be reliable and relevant—which is exactly what *Daubert* instructed courts how to determine.

Therefore, Rule 702 and *Daubert* should not be distinguished. Separating *Daubert*'s analysis and Rule 702's analysis is difficult considering that the substance of the *Daubert* opinion interpreted how Rule 702 should be analyzed. Rule 702 must be followed in federal court, and the *Daubert* opinion instructs courts how to apply Rule 702 to expert testimony. *Daubert* put a binding gloss on Rule 702 by telling courts what reliability means and how it should be assessed. Therefore, when a district court is confronted with expert testimony under Rule 702, the court should always look to the guidelines that the Supreme Court established in *Daubert*.

Essential Dilemma, and Its Progeny, 29 CREIGHTON L. REV. 939, 971 (1996). This commentator continued, stating that "the correct approach seems to be that the essence of *Daubert* applies to all expert testimony, novel or not, scientific or not." *Id.* at 972. Although *Daubert* explained how to analyze expert evidence under the scientific branch of Rule 702, the Supreme Court's approach should apply to the other branches of expertise as well. *See id.*

Moreover, nothing in the Federal Rules of Evidence or in the advisory committee notes indicates that different standards should apply to scientific, technical, or specialized knowledge. *See* FED. R. EVID. 702 advisory committee's notes. The drafters of the Rules of Evidence obviously spent a significant amount of time and effort carving out the 29 exceptions to the hearsay rule. *See* FED. R. EVID. 803, 804. If the drafters intended that different standards should apply to various types of experts under Rule 702 or that there should be exceptions for certain kinds of expert evidence, arguably, they would have incorporated them into the Rules.

A majority of courts have followed this logic and applied *Daubert* to expert testimony that falls under the "technical" or "specialized knowledge" categories of Rule 702. *See* discussion *supra* note 31. Courts that adopt the narrow view of *Daubert*, holding that it is only applicable to novel scientific evidence, discount the purpose and intent of *Daubert*, which mandates that expert testimony be both reliable and relevant. As one commentator suggested: "*Daubert* could be read to apply only to 'scientific knowledge,' . . . [but s]uch a reading displays a crabbed interpretation of the Court's opinion as well as a misconstruction of the principles underlying Rule 702." David L. Faigman, *Mapping the Labyrinth of Scientific Evidence*, 46 HASTINGS L.J. 555, 559 (1995) (footnotes omitted).

80. *Compton*, 82 F.3d at 1518 (quoting FED. R. EVID. 702).

B. Distinguishing Between an Expert's Experience and Methodology

Unlike the *Compton* court, *Daubert* made no distinction between an expert's experience and methodology. *Daubert* instructed courts to assess the expert's underlying "reasoning or methodology,"[81] suggested an examination of the expert's "theory or technique,"[82] and concluded that the underlying "principles and methodologies" must be relevant and reliable.[83] While the Court used these terms interchangeably, the bottom line was that whatever the expert did to reach his conclusion must be examined to ensure reliability and relevance. Indeed, the definitions of "reasoning," "methodology," "theory," "technique," and "principle" all point to the process and underlying basis of an opinion and can be referred to as the expert's methodology.[84] In the broad sense of the term, one commentator noted that "[m]ethodology involves the process by which the expert arrived at her conclusion."[85]

The *Compton* court concluded that because the expert based his opinion on his "experience" and "training," no methodology, principle, or any reasoning was involved in the expert's opinion.[86] However, any valid expert opinion--especially opinions

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81. Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 592-93 (1993).

82. *Id.* at 593.

83. *Id.* at 595.

84. "Reasoning" is defined as "the use of reason; . . . the drawing of inferences or conclusions through the use of reason." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1892 (1971).

"Methodology" is defined as "a body of methods, procedures, working concepts, rules, and postulates employed by a science, art or discipline . . . the processes, techniques, or approaches employed in the solution of a problem or in doing something." *Id.* at 1423.

"Theory" is defined as "the body of generalizations and principles developed in association with practice in a field of activity; . . . the coherent set of hypothetical, conceptual, and pragmatic principles forming the general frame of reference for a field of inquiry." *Id.* at 2371.

"Principle" is defined as "a general or fundamental truth: a comprehensive and fundamental law, doctrine, or assumption on which others are based or from which others are derived." *Id.* at 1803.

85. JoAnne A. Epps, *Clarifying the Meaning of Federal Rule of Evidence 703*, 36 B.C. L. REV. 53, 69 (1994).

86. The *Compton* court's reasoning is logically flawed. The court first quoted *Daubert* stating that the focus must be on the *principles* and *methodology* underlying the expert's testimony. *See* Compton v. Subaru of Am., Inc., 82 F.3d 1513, 1518 (10th Cir.), *cert. denied*, 117 S. Ct. 611 (1996) (emphasis added). The court then held that *Daubert* is "applicable only when a proffered expert relies on some *principle* or

based on scientific, technical, or specialized knowledge—should be logically founded upon some methodology, reasoning, or principle.[87] Otherwise, the opinion would be merely unsupported speculation. Even if an opinion was based solely on past experience, the experience itself arguably would be part of the methodology used to arrive at the opinion. Therefore, the quality of the past experience and the methods and reasoning used to compare the past experience with the current facts should be analyzed to ensure that the opinion is reliable and relevant.

Instead of following this broad definition of methodology, under the *Compton* court's reasoning, an expert can claim that no methodology was involved in forming his testimony and that his opinion is valid based on his experience and training. This reasoning allows an expert to circumvent any *Daubert* analysis and escape the requirements of Rule 702 as established by *Daubert*. If the expert's methodology and reasoning is not or cannot be validated, the expert is delving into the realm of "subjective belief or unsupported speculation."[88] Moreover, if an expert has no methodology or reasoning which can be validated under *Daubert*, then the testimony would not be helpful to the fact finder.[89] Therefore, to ensure that the *Compton* jury was

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methodology." *Id.* (emphasis added). On the subsequent page, the court held that *Daubert* sets out additional factors "if an expert witness offers testimony based upon a particular *methodology* or *technique*." *Id.* at 1519 (emphasis added). The court then concluded that the expert's testimony was not based on any particular *methodology* or *technique* and that the expert reached his conclusions based on general engineering *principles* and his *experience*. Thus, "[a]bsent some particular *methodology* or *technique*, *Daubert* simply has little bearing on Mr. Bihlmeyer's testimony." *Id.* (emphasis added).

It is unclear how these statements are consistent with one another. In one breath the court held that *Daubert* applied to experts relying on a principle, and in the next breath the court acknowledged that Mr. Bihlmeyer based his opinion on engineering principles, but held that *Daubert* did not apply. Indeed, the court's loose use of these terms contributed to the avoidance of a *Daubert* analysis.

87. *See* Simard & Young, *supra* note 79, at 1472-73.

> Knowledge, whether categorized as scientific, technical, or specialized, evolves from the validation of a theory or hypothesis—an idea. The processes that transform particular ideas into validated knowledge may vary. But each process, as different as it may be from another, can be characterized as an evolutionary continuum along which an idea travels in its quest for validation. The distance an idea has traveled along this continuum provides evidence of its reliability.

Id. (footnote omitted).

88. *Daubert*, 509 U.S. at 590.

89. *See* Pestel v. Vermeer Mfg. Co., 64 F.3d 382, 384 (8th Cir. 1995) (concluding,

presented with helpful information, the court should have examined the expert's reasoning or methodology underlying his testimony, even though it was allegedly based only upon his experience and training.

C. *Analyzing the Expert's Underlying Methodology or Reasoning*

Compton seems to have reasoned that any opinion based on experience or training is reliable enough to get to the jury, but under *Daubert* a court must still ensure that there is a basis of reliability underlying the expert's experience. While a person can qualify as an expert under Rule 702 as a result of knowledge, skill, experience, training, or education, this does not open the gate for the admissibility of anything the expert proffers. One law professor argued that although judges have "considerable discretion in dealing with expert testimony, they do not have the discretion to do away with *Daubert* testing."[90] Furthermore, "[n]o matter how well qualified an expert, the trial judge must still assess the reliability of the theory and methodology both in general and as applied to the facts of the case at bar."[91] Under *Daubert*, experience is not sufficient in and of itself, to indicate reliability. The court must look at the quality of the experience and the method or reasoning by which that experience is applied to the facts at issue.

Daubert's intention was to require a district court to assume a gatekeeping role by analyzing the expert's underlying reasoning, methodology, principles, or techniques upon which the opinion was based to determine whether it would be helpful to the fact finder. In response to the Chief Justice's dissent in *Daubert*,[92] the majority noted: "The Chief Justice 'do[es] not doubt that Rule 702 confides to the judge some gatekeeping responsibility,' but would neither say how it does so nor explain

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after an assessment of the reasoning and methodology underlying the expert's testimony, that the testimony was not valid and would not aid the jury in its fact finding); Porter v. Whitehall Lab., Inc., 9 F.3d 607, 614 (7th Cir. 1993) ("If experts cannot tie their assessment of data to known scientific conclusions, based on research or studies, then there is no comparison for the jury to evaluate and the experts' testimony is not helpful to the jury.").

90. Fenner, *supra* note 79, at 969.

91. *Id.*

92. *See supra* text accompanying note 33.

what that role entails. We believe the better course is to note the nature and source of the duty."[93] The Court explained that the source of the duty is Rule 702, and the nature of the duty is to ensure reliability and relevance, both of which *Daubert* held were to be determined through the validation of the underlying reasoning or methodology.[94]

If *Daubert's* intention is applied by assessing an expert's reasoning or methodology and ensuring that it is valid, courts will be requiring the experts to do more than speculate, thus assisting the trier of fact as required under Rule 702.[95] In order to go beyond speculation, an expert must have some valid reasoning or methodology; without such, an opinion is simply not helpful.[96] If the underlying reasoning or methodology cannot be

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93. *Daubert*, 509 U.S. at 589 n.7 (quoting the dissenting opinion at 600). *But see supra* text accompanying note 33.

94. *See id.* at 592.

95. Many courts have upheld *Daubert's* intent and required experts to do more than speculate, instead, requiring experts to base their opinions on a reliable methodology. Indeed, *Daubert* requires that expert testimony be based on something more than mere speculation. The Fifth Circuit, applying *Daubert*, held that "[t]o be 'helpful' under Rule 702, the evidence must possess validity when applied to the pertinent factual inquiry." United States v. Posado, 57 F.3d 428, 433 (5th Cir. 1995). In order to assist the trier of fact, information must be accurate and reliable. The court continued, stating that "[e]videntiary reliability, or trustworthiness, is demonstrated by a showing that the knowledge offered is 'more than speculative belief or unsupported speculation.'" *Id.* (quoting *Daubert*, 509 U.S. at 590). Furthermore, "there should be proof that the principle supports what it purports to show, i.e. that it is valid." *Id.*

96. In *Deimer v. Cincinnati Sub-Zero Products, Inc.*, an expert proffered unverified statements that were unsupported by any scientific method, and the court held that "[t]his type of unsubstantiated testimony plainly provides no basis for relaxing the usual first-hand knowledge requirement of the Federal Rules of Evidence on the ground that the expert's opinion has a reliable basis in knowledge and experience of his discipline." 58 F.3d 341, 345 (7th Cir. 1995). The court upheld the district court's reasoning that where there is no supporting methodology or protocol of any kind, the opinion cannot be reasonable or credible, and there is no foundation on which to base a conclusion. *See id.* at 344-45.

Indeed, the essence of *Daubert* requires expert testimony to be based on a valid methodology. In *Cavallo v. Star Enterprise*, a district court held that "underlying the Rules' allowance of expert testimony is the fundamental 'assumption that an expert's opinion will have a reliable basis in the knowledge and experience of his discipline.' . . . Thus, conjecture, hypothesis, 'subjective belief, or unsupported speculation' are impermissible bases for expert opinion and must be discarded." 892 F. Supp. 756, 760-61 (E.D. Va. 1995) (quoting *Daubert*, 509 U.S. at 590), *aff'd in part and rev'd in part*, 100 F.3d 1150 (4th Cir. 1996). Furtharmore, "*Daubert* commands that in court, science must do the speaking, not merely the scientist." *Id.* at 761. If an expert relies upon his own opinion which is based on no more than intuition or belief and not subject to rigorous scientific validation, then the expert is simply giving

verified, falsified, refuted, or tested by any objective means, then it would be incapable of meeting the validity criterion established by *Daubert*.[97] Perhaps one of the best indicators as to whether an expert's reasoning or methodology is reliable is whether the expert has followed the criterion established in his profession. An expert should not be able to have his testimony admitted in court on standards that are less than what is expected in the expert's field. Rather, the expert should be held to the same requirements as demanded in his professional work.[98] Furthermore, to allow testimony that is not based on valid reasoning, reliable principles, or sound methodologies simply because the witness qualifies as an expert would relax the standard set out in *Daubert* and permit unreliable evidence to be admitted.[99] Therefore, regardless of the type of expert testi-

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a hypothesis that falls short of the evidentiary requirements of Rule 702. *See id.* at 761 n.9.

In *Navarro v. Fuji Heavy Industries, Ltd.*, a case factually similar to *Compton*, an expert based his opinion on his education, training, experience, knowledge of literature, and his inspection of the vehicle and accident site. The court held that the expert did not provide adequate scientific support for his conclusions, and because he employed no methodology, testing, or researching techniques the expert did not satisfy even a liberal reading of the *Daubert* requirements. *See* 925 F. Supp. 1323, 1328-29 (N.D. Ill. 1996). The court further held that "[e]xperts cannot float their conclusions on cushions of air; they must rest those conclusions upon foundations built from reliable scientific explanation." *Id.* at 1328.

97. *See* Brown v. Miska, No. Civ. A. V-94-067, 1995 WL 723156, at *4 (S.D. Tex. July 19, 1995), *aff'd*, 96 F.3d 1445 (5th Cir. 1996).

98. Chief Judge Posner of the Seventh Circuit recently held in *Rosen v. Ciba-Geigy Corp.* that *Daubert*'s object "was to make sure that when scientists testify in court they adhere to the same standards of intellectual rigor that are demanded in their professional work." 78 F.3d 316, 318 (7th Cir.), *cert. denied*, 117 S. Ct. 73 (1996). The court excluded the testimony of a doctor because his opinion lacked scientific rigor, theoretical reason, and experimental data, and concluded: "[T]he courtroom is not the place for scientific guesswork." *Id.* at 319.

99. The Seventh Circuit, ensuring that all expert testimony is reliable, applied *Daubert* to a case involving an accounting expert. In *Frymire-Brinati v. KPMG Peat Marwick*, the court held that "[a]dmitting [the expert's] 'fairly simple pass' into evidence just because he is an expert in accounting is problematic." 2 F.3d 183, 186 (7th Cir. 1993). The court continued, holding that the expert "did not employ the methodology that experts in valuation find essential," and that as a result the expert's testimony was not reliable. *Id.* "The Federal Rules of Evidence require a judge to undertake '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 186-87 (quoting *Daubert*, 509 U.S. at 580).

mony proffered, *Daubert*'s fundamental requirement of sound reasoning and methodology must not be abandoned.[100]

D. A Flexible Approach to Daubert's *Factors*

To ensure that an expert's opinion is based on sound methodologies and reasoning, a flexible application of *Daubert*'s factors is necessary. *Daubert* suggested four factors by which an expert's opinion could be analyzed to ensure reliability: (1) whether the theory or technique underlying the evidence can be or has been tested, (2) whether it has been subjected to peer review and publication, (3) whether there is a known potential rate of error, and (4) whether the theory or technique has been generally accepted.[101] Applying *Daubert* to a variety of expert testimony will require courts to be flexible in the exact application of these factors, but this flexibility was anticipated by the Supreme Court.[102] The Court held that "[m]any factors will bear on the inquiry, and we do not presume to set out a definitive checklist or test. But some general observations are appropriate."[103] Indeed, the *Daubert* court simply recommended the four factors mentioned above to determine if the reasoning or methodology underlying the opinion is reliable and relevant.[104]

Due to the variety of expert witnesses and fact patterns, it would be impossible to attempt to compile a list of factors applicable to all expert testimony. Therefore, following the general guidelines of *Daubert*, a case-by-case inquiry into the reliability of a specific methodology is appropriate.[105] Because this inquiry was intended to be flexible, district courts are entrusted with discretion in applying these or other relevant factors in determining whether to admit expert testimony. Cases may arise where strict adherence to *Daubert*'s suggested factors to deter-

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100. According to the Seventh Circuit, the Supreme Court "counsels against a wholesale abandonment of the *Daubert* analysis simply because the issue before the court, although rooted in science, involves the application of science to a concrete and practical problem." Cummins v. Lyle Indus., 93 F.3d 362, 367 n.2 (7th Cir. 1996).

101. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593-94 (1993).

102. *See id.* at 594 ("The inquiry envisioned by Rule 702 is . . . a flexible one.").

103. *Id.* at 593.

104. *See id.* at 594. On remand, the Ninth Circuit commented: "We read these factors as illustrative rather than exhaustive; similarly, we do not deem each of them to be equally applicable (or applicable at all) in every case." Daubert v. Merrell Dow Pharms., Inc., 43 F.3d 1311, 1316-17 (9th Cir.), *cert. denied*, 116 S. Ct. 189 (1995).

105. *See* Simard & Young, *supra* note 79, at 1471.

mine reliability is less applicable.[106] In some cases, a court may find the underlying methodology so established and reliable that the court could simply take judicial notice of the reliability of the testimony.[107] In other cases, since the *Daubert* factors are not exhaustive, courts may fulfill their gatekeeping responsibility by considering additional factors to those already existing.[108] The exact inquiry that a district court chooses to use is not critical so long as the content and purpose of *Daubert* is not forgotten.[109] One commentator noted that "the factors [may] include anything that is relevant to the decision of whether the methodology employed by the expert and the theories underlying the expert's testimony are 'good.'"[110] Indeed, the principles

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106. One may argue that the strict requirements of *Daubert* are not as applicable to the *Iacobelli* construction expert or to an expert called upon to testify about a duty of care. *See supra* text accompanying note 32. But, if these experts can show that their opinion was based on valid reasoning, methodologies, or principles—even if derived from their experience, so long as their experience is valid and applicable to the current facts—their testimony will most likely pass *Daubert* scrutiny.

The exact fit of *Daubert*'s analysis may vary between a physicist and an accountant, but in the case of an engineer, as was the case in *Compton* and most product liability cases, *Daubert*'s factors are appropriate. "In mechanical design cases, experts are routinely asked to address product safety performance, safer alternative designs, and issues of causation, all of which areas are likely to raise *Daubert* red flags." Nelson G. Apjohn & Susan M. Quill, *Post-*Daubert' *Admissibility of Expert Testimony on Mechanical Design and Engineering Issues*, 23 Prod. Safety & Liab. Rep. (BNA) 533, 557 (1995).

107. *See Daubert*, 509 U.S. at 592 n.11 ("Indeed, theories that are so firmly established as to have attained the status of scientific law, such as the laws of thermodynamics, properly are subject to judicial notice under Federal Rule of Evidence 201.").

108. In *In re Paoli Railroad Yard PCB Litigation*, the Third Circuit expanded the *Daubert* factors and maintained its gatekeeping responsibility by applying the following criteria to assess the expert's reliability:

> (1) whether a method consists of a testable hypothesis; (2) whether the method has been subject to peer review; (3) the known or potential rate of error; (4) the existence and maintenance of standards controlling the technique's operation; (5) whether the method is generally accepted; (6) the relationship of the technique to methods which have been established to be reliable; (7) the qualifications of the expert witness testifying based on the methodology; and (8) the non-judicial uses to which the method has bean put.

35 F.3d 717, 742 n.8 (3d Cir. 1994). The *Paoli* court also added a ninth catch-all factor: "as well as any others that are relevant." *Id.* at 742.

109. *See In re* Aluminum Phosphide Antitrust Litig., 893 F. Supp. 1497, 1506 (D. Kan. 1995) ("The inquiry is a flexible one, with the overarching subject being the evidentiary relevance and reliability of the principles that underlie a proposed submission.").

110. Fenner, *supra* note 79, at 1012. "The relevant question, phrased variously

of relevance and reliability should be paramount in this flexible case-by-case analysis.[111] *Daubert*'s structure must be preserved by requiring some indicia of reliability. If judges will focus on the origin, nature, methods, and limits of the expert's theory, they will be able to gain the necessary insight to determine the reliability of a proffered theory.[112]

This type of analysis would have been beneficial in assisting the *Compton* court in its evaluation of Mr. Bihlmeyer's testimony. The Tenth Circuit should have moved beyond its limited analysis and examined the expert's underlying reasoning and methodology. This could have been accomplished by applying *Daubert*'s factors in a flexible manner. Three of *Daubert*'s factors could have been applied directly to the expert's testimony concerning his defectively designed roof theory: (1) has the theory been tested,[113] (2) has it been subjected to peer review,[114] and (3) has the theory been generally accepted.[115] Additionally, the court should have inquired further by applying additional factors, such as: whether the expert's past experience related to the methods he used in forming his conclusion; whether his

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is: Are the theory and the methodology reliable, are they sound, are they respectable, can they be demonstrated to have sufficient value? . . . The judge's inquiry ends where the factors cease being relevant to answering this question, however it is phrased." *Id.*

111. In a recent products liability case against an automobile manufacturer, the First Circuit held that even if *Daubert*'s scientific factors did not apply to the expert's testimony, "the admissibility of the testimony was still controlled by the requirement of factual relevance and foundational reliability." Bogosian v. Mercedes-Benz, Inc., 104 F.3d 472, 479 (1st Cir. 1997) ("'*Daubert*'s countervailing precept [is] that the trial judge is assigned "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to tha task at hand."'" (quoting Vadala v. Teledyne Indus., Inc., 44 F.3d 36, 39 (1st Cir. 1995) (quoting *Daubert*, 509 U.S. at 597))).

112. *See* Simard & Young, *supra* note 79, at 1471.

113. The Seventh Circuit held that "hands-on testing" is not an absolute, but that the expert should adhere to the same rigors as demanded in her professional work, which "can be accomplished in a number of different ways, including through the review of experimental, statistical, or other scientific data generated by others in the field." Cummins v. Lyle Indus., 93 F.3d 362, 369 (7th Cir. 1996).

114. The expert's design defect theory, as well as his alternative design theory, could have been examined to determine if other automotive manufacturers were aware of his assertions and if others would have agreed with his methodology in analyzing the vehicle.

115. This factor is similar to that of peer review and would allow the court to determine what methodology other experts in the industry would use to formulate an opinion in a similar situation, which would demonstrate whether the methods used in reaching the opinion at bar were reliable.

opinion was based on any verifiable facts, or was it merely speculation; whether his opinion would withstand the rigors required in his professional field of automotive design and testing; and whether the expert's testimony was prepared solely for litigation. Obviously, the district judge, who has all of the facts before him, is best suited to determine how the facts will be applied to these factors. Therefore, the Tenth Circuit should have remanded the case to the district court for an assessment of these factors, which would have given the court added insight to the reliability of this expert's testimony. Unfortunately, *Compton*'s reasoning left this type of analysis completely untouched.

V. CONCLUSION

When the Tenth Circuit decided *Compton*, the court opened the gate to unsupportable and unreliable evidence. *Compton* created a loophole by which experts can bypass *Daubert*'s analysis, thereby rewarding the expert who avoids any validation of his opinion. The *Compton* court should not have disposed of *Daubert*'s analysis simply because an expert based his opinion on experience and training and not upon a scientific methodology. Rather, the court should have analyzed the underlying reasoning or methodology that was used to reach the expert's conclusions. In the future, district courts should analyze the reasoning or methodology underlying any expert opinion, thus ensuring that the expert opinion is reliable and relevant enough to assist the trier of fact. *Daubert*'s suggested factors may be applied in a flexible manner; however, some indicia of reliability must remain intact, thus maintaining the Supreme Court's standard for the reliability and relevance of expert testimony.

Applying *Daubert* in a uniform yet flexible manner to all expert testimony will provide an effective means to evaluate expert testimony. Without a uniform standard, an expert's testimony that is likely to fail under *Daubert*'s scientific factors could be repackaged under the guise of technical or nonscientific evidence and could avoid the application of *Daubert*. Even worse, under *Compton*'s logic, an expert can claim that no methodology or technique was involved and that the testimony was based solely on experience, thus avoiding the reliability and relevance requirements mandated by *Daubert*. Finally, applying *Daubert* in a uniform, yet flexible manner to

all expert evidence—regardless of whether based on scientific, technical, or specialized knowledge[116]—would not only ensure that evidence is reliable and relevant, but also would provide an element of predictability, which has been absent in federal court since *Daubert* was decided.[117]

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116. This approach could bridge the gap that has been created by the different circuit courts. *See* discussion *supra* Part II.C. Courts that were applying *Daubert* to scientific, technical, and specialized knowledge would be able to continue to do so in a more efficient manner, and courts that were applying *Daubert* only to scientific knowledge would be able to apply *Daubert* in a flexible manner that would accurately assess the reliability of nonscientific evidence. *Compton* is a good example of how both parties wanted the court to adopt different approaches offered by the splitting circuits; and although the Tenth Circuit avoided this issue, the court could have resolved the issue by applying *Daubert* in a uniform yet flexible manner.

117. If the litigants knew by what standard their expert evidence would be measured, cases would be less likely to be thrown out because the expert's testimony did not qualify under *Daubert*. Litigants would be able to ensure that their expert's testimony was both reliable and relevant prior to being challenged at trial. Moreover, adopting a uniform approach that requires all experts to meet *Daubert*'s criteria would promote judicial economy by significantly decreasing the amount of time and effort spent deciding what standard to apply to certain expert testimony. The needless debate of trying to delineate between scientific, quasi-scientific, and nonscientific evidence would end, and frivolous lawsuits could be dismissed when the expert has not based his opinion on valid reasoning, reliable methodologies, or sound principles. Therefore, a single conceptual framework for evaluating the admissibility of all types of expert evidence would be preferable to litigants and judges. *See* American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Evidence After* Daubert, 157 F.R.D. 571, 577-78 (1994).