

IN THE SUPREME COURT OF ALABAMA
November 29, 2011

ORDER

WHEREAS, the Alabama Legislature at its most recent session enacted Act No. 2011-629, which amended § 12-21-160, Ala. Code 1975, effective January 1, 2012, to adopt, with some exceptions, the standard for scientific expert testimony established in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993); and

WHEREAS, this Court wanted Rule 702, Alabama Rules of Evidence, "Testimony by Experts," to be consistent with § 12-21-160;

IT IS THEREFORE ORDERED that Rule 702, Alabama Rules of Evidence, be amended to read in accordance with Appendix A attached to this order;

IT IS FURTHER ORDERED that the Advisory Committee's Notes to Amendment to Rule 702 Effective January 1, 2012, are adopted to read in accordance with Appendix B attached to this order;

IT IS FURTHER ORDERED that the Court Comment to Amendment to Rule 702 Effective January 1, 2012, is adopted to read in accordance with Appendix C attached to this order;

IT IS FURTHER ORDERED that the amendment of this rule and the adoption of the Advisory Committee's Notes and the Court Comment are effective January 1, 2012;

IT IS FURTHER ORDERED that the following note from the reporter of decisions be added to follow Rule 702:

"Note from the reporter of decisions: The order amending Rule 702, Alabama Rules of Evidence, effective January 1, 2012, and adopting the Advisory Committee's Notes to Amendment to Rule 702 Effective January 1, 2012, and the Court Comment to Amendment to Rule 702 Effective January 1, 2012, is published

in that volume of Alabama Reporter that contains
Alabama cases from __ So. 3d __."

Malone, C.J., and Woodall, Stuart, Bolin, Parker, Shaw,
Main, and Wise, JJ., concur.

APPENDIX A

Rule 702. Testimony by Experts

(a) 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.

(b) In addition to the requirements in section (a), expert testimony based on a scientific theory, principle, methodology, or procedure is admissible only if:

(1) The testimony is based on sufficient facts or data;

(2) The testimony is the product of reliable principles and methods; and

(3) The witness has applied the principles and methods reliably to the facts of the case.

The provisions of this section (b) shall apply to all civil state-court actions commenced on or after January 1, 2012. In criminal actions, this section shall apply only to nonjuvenile felony proceedings in which the defendant was arrested on the charge or charges that are the subject of the proceedings on or after January 1, 2012. The provisions of this section (b) shall not apply to domestic-relations cases, child-support cases, juvenile cases, or cases in the probate court. Even, however, in the cases and proceedings in which this section (b) does not apply, expert testimony relating to DNA analysis shall continue to be admissible under Ala. Code 1975, § 36-18-30.

(c) Nothing in this rule is intended to modify, supersede, or amend any provisions of the Alabama Medical Liability Act of 1987 or the Alabama Medical Liability Act of 1996 or any judicial interpretation of those acts.

APPENDIX B

Advisory Committee's Notes to Amendment to
Rule 702 Effective January 1, 2012

Rule 702 was amended in response to a 2011 amendment to § 12-21-160, Ala. Code 1975, see Act No. 2011-629, Ala. Acts 2011, which establishes new admissibility criteria for expert scientific testimony. Act No. 2011-629 provides:

"Section 1. Section 12-21-160 of the Code of Alabama 1975, is amended to read as follows:

"§ 12-21-160.

"(a) Generally. 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.

"(b) Scientific evidence. In addition to the requirements set forth in subsection (a), expert testimony based on a scientific theory, principle, methodology, or procedure is only admissible if:

"(1) The testimony is based on sufficient facts or data,

"(2) The testimony is the product of reliable principles and methods, and

"(3) The witness has applied the principles and methods reliably to the facts of the case.

"Section 2. Nothing in this act shall modify, amend, or supersede any provisions of the Alabama Medical Liability Act of 1987 and the Alabama Medical Liability Act of 1996, commencing with Section 6-5-540 of the Code of Alabama 1975, et seq., or any judicial interpretation thereof.

"Section 3. This act shall apply to all civil state court actions commenced on or after the effective date of this act. In criminal actions, this act shall only apply to non-juvenile felony proceedings in which the defendant that is the subject of the proceeding was arrested on the charge that is the subject of the proceeding on or after January 1, 2012. This act shall not apply to domestic relations, child support, juvenile, or probate cases.

"Section 4. The provisions of this act, where inconsistent with any Alabama Rule of Civil Procedure, Alabama Rule of Criminal Procedure, or Alabama Rule of Evidence, including, but not limited to, Ala. R. Evid. 702, shall supersede such rule or parts of rules.

"Section 5. This act shall become effective on January 1, 2012."

To promote uniformity and avoid confusion, Rule 702 has been amended to adopt the admissibility standard for scientific evidence set forth in Section 1 of Act No. 2011-629, amending § 12-21-160. To promote clarity, this amendment divides Rule 702 into subsections. The text of Rule 702, as it read before this amendment, has been placed unchanged in section (a), and the new admissibility standard for scientific evidence is set forth in section (b).

Section (a) Generally. The amendment merely places the text of the former rule in a separate section. No changes have been made to the text, and preexisting judicial authority interpreting Rule 702 remains applicable to Rule 702(a).

Section (b) Scientific Evidence. The language in subsections (b)(1), (b)(2), and (b)(3) is identical to language added to Rule 702 of the Federal Rules of Evidence in response to the United States Supreme Court's decision in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The amendment adopts the approach taken in Daubert for determining the admissibility of scientific evidence. Consequently, the Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), general-acceptance test has been supplanted, with few exceptions. The amendment requires trial judges to act as

"gatekeepers" and determine whether the scientific evidence is both "relevant and reliable." See Daubert, 509 U.S. at 597.

The Daubert test is not new to Alabama. By statute, the admissibility of scientific expert testimony based on DNA analysis has been governed by the test set forth in Daubert since 1994. See Ala. Code 1975, § 36-18-30. This amendment is not intended to effect any change in the line of well developed judicial authority that has applied and interpreted the Daubert test pursuant to § 36-18-30. See generally Turner v. State, 746 So. 2d 355 (Ala. 1998) (discussing § 36-18-30 and the requirements of the Daubert test); 1 C. Gamble & R. Goodwin, McElroy's Alabama Evidence § 490.01(11) (6th ed. 2009) (discussing the admissibility of DNA evidence under the Daubert standard). The admissibility criteria imposed generally on all scientific evidence by Rule 702(b) is the same Daubert criteria imposed on DNA evidence by § 36-18-30.

APPENDIX C

Court Comment to Amendment to Rule 702 Effective January 1, 2012

The Advisory Committee recommended to the Court that the legislative exceptions set out in Section 3 of Act No. 2011-629, Ala. Acts 2011, not be incorporated into the amendment to Rule 702. The Court, however, disagreed and incorporated those exceptions into Rule 702(b). By doing so, the Court did not intend to affect the applicability of Ala. Code 1975, § 36-18-30, which provides that the admissibility of scientific expert testimony based on DNA analysis is governed by the test set forth in Daubert v. Merrill Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), and added a sentence to clarify that § 36-18-30 still governs the admissibility of scientific expert testimony based on DNA analysis, even in domestic-relations cases, child-support cases, juvenile cases, and cases pending in the probate courts.

The provisions of section (a) apply in all cases where Rule 702 was previously applied. The provisions in section (b), however, do not apply in all cases. Except as otherwise noted in the rule, they apply in all civil state-court actions commenced on or after January 1, 2012. In criminal actions, section (b) applies only in nonjuvenile felony proceedings in which the defendant who is the subject of the proceeding was arrested on the charge that is the subject of the proceeding on or after January 1, 2012. In addition, except as to expert testimony governed by § 36-18-30, the provisions of section (b) do not apply to testimony in domestic-relations cases, child-support cases, juvenile cases, or cases in the probate court.

The provisions of the Alabama Medical Liability Act of 1987 and the Alabama Medical Liability Act of 1996, § 6-5-540 et seq., Ala. Code 1975, and any judicial interpretation of those provisions remains unaffected by this amendment.