

## Daubert and Treating Physicians

### **I. Background and Major Themes of Daubert in Trilogy of Federal Cases**

- a. *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993) – established new test for admissibility of expert testimony, overruling Frye test of general acceptance.
  - i. (Reversed and remanded on procedural grounds for application of test to testimony of 8 plaintiff experts who opined Bendectin caused birth defects based on in vitro, animal and epidemiological studies.)
- b. **Trial Judge has the obligation to be the gate keeper who must screen proffered expert testimony.** *Daubert*, 509 U.S. 579, 589 (1993).
  - i. The purpose of *Daubert's* gate keeping requirement “is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field” *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167, 1176 (1999).
  - ii. Trial court should consider factors outside the *Daubert* factors and all *Daubert* factors may not apply in each case. *Kumho Tire Co. v. Carmichael*, 119 S.Ct. 1167.
- c. **Objective is to make certain that admissible expert testimony is relevant AND reliable.** *Id.*
- d. **Focus must be on Reliable method and not on Conclusions:**
  - i. Must be “ground in the methods and procedures of science.” *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579, 590 (1993).
  - ii. Must also be a flexible determination. *Id.* at 594.
  - iii. 4 Factors (not definitive) for determining Scientific Methodology:
    1. Can the method be tested? (or has it been)
    2. Subjected to peer review and publication?
    3. Known or potential error rates determined?
    4. Generally accepted in Community?
- e. *General Electric v. Joiner*, 522 U.S. 136 (1997) – **abuse of discretion** is the standard of reviewing trial court ruling on gate keeping function.
  - i. (Upheld exclusion of plaintiff experts that exposure to chemicals promoted the development of small-cell lung cancer in long time smoker).
  - ii. Experts were pooling data from several studies.
  - iii. Lower court can determine that there is too big an analytical gap.
- f. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) – *Daubert* analysis applies to all expert testimony, but the **analysis is a flexible** one based on the circumstances of the particular case at issue and expert must observe the same “intellectual rigor” in testifying as employed with matters outside the courtroom.

- i. (Upholding exclusion of expert who based opinion that tire blow out was caused by manufacturer defect on visual inspection, experience and also made concession of several other potential causes).
- g. **“The search is not a search for scientific precision. We cannot hope to investigate all the subtleties that characterize good scientific work.”** Associate Justice of The United States Supreme Court, Stephen Breyer, Fed. Jud. Center, *Reference Manual on Scientific Evidence*, (3d Ed. 2011).

## II. Code and Rules of Evidence Committee

- a. Recommended Against Adoption of *Daubert* standard 2/1/16
- b. Oral Argument on issue of adoption of *Daubert* standard held on September 1, 2016.
  - i. Celene Report: Justices were concerned about these issues:
    - 1. Abusive Motions – possible solution may be to restrict the scope of the standard.
    - 2. Criminal – possibility of restricting Daubert standard to criminal Cases (Pariente and Lewis).
    - 3. Medical Causation – does not apply here. Medical causation is uniquely an issue of fact. Parties can be denied their right to have an important factual issue decided by a jury. Scientific methodology challenge goes to weight and not admissibility of treating physician opinion.
  - ii. Preserve the Issue.
  - iii. Ruling not expected until *maybe* end of first quarter 2017.

## III. Florida Law: §90.702, Florida Statutes, (Effective July 1, 2013)

- a. “Legislative purpose of the amendment is to tighten the rules of admissibility of expert testimony in the courts of this state.” *Perez v. Bell South Telecommunications, Inc.*, 138 So. 3d 492, 497 (Fla. 3d DCA 2014). (Striking obstetrician who opined that work related stress and employer refusal to permit frequent bathroom breaks caused placental abruption in an already high risk pregnancy for gastric bypass, obesity and gastric band)(standard applies retroactively). (CERC - not up to 3d DCA to determine – or the 1<sup>st</sup> DCA).
- b. Also be aware of *Gaiamo v. Florida Autosport, Inc.*, 154 So.3d 385 (Fla. 1<sup>st</sup> DCA 2014) (Overruling *Marsh v. Valyou*, 977 So.2d 543 (Fla. 2007) (which upheld the *Frye* standard). (Worker’s Comp case not involving a jury trial).
- c. Requirements of §90.702, Florida Statutes:
  - i. Assists the trier of fact,
  - ii. Based on sufficient facts and data,
  - iii. Product of reliable principles and methods,

iv. Reliable application of principles and methods.

Application to Treating Physicians and Causation

IV. Understanding Medical Decision Making

1. Physicians do not understand what medical certainty is.
2. Physicians are trained to think about potential causes as it applies to testing, evaluation or optimal treatment.
3. Physicians often deal with multiple causes at one time – must weigh risk and benefits of testing and treatment..
4. Physicians don't care about potential causes:
  - a. that have been removed or are no longer contributing factors;
    1. Lung cancer in a former smoker who use to work as a painter
  - b. or when the optimal treatment does not depend on the cause
    1. For example with breast cancer

V. Differential Diagnosis

1. The process of weighing the probability of one disease/anatomical variant, physiologic variant or behavior versus another disease, behavior or variants possibly accounting for a patient's illness or condition (to determine optimal treatment, testing or to remove the causative factor).
  1. Example: The **differential diagnosis** for a runny nose includes allergic rhinitis (hayfever), the abuse of nasal decongestants and, of course - the common cold.
2. Technique (scientific method) by which a physician first rules in all plausible causes of injury and then rules out less likely causes until the most likely cause(s) remain(s).
  1. Robert Martinez, MD differential diagnosis
  2. Can be more than one substantial contributing factor that causes the condition.
  3. *Guinn v. AstraZeneca Pharma., L.P.*, 602 F.3d 1245, 1253 (11<sup>th</sup> Cir. 2010)(physician not required to rule out *all* other causes).
  4. Be aware of *Hendrix v. Evenflo Co., Inc.*, 609 F.3d 1183 (11<sup>th</sup> Cir. 2010)(Expert testimony that head injuries resulting from mva lead to autism excluded for failure to establish general causation).

VI. Authority for Differential Diagnosis as a Scientific Methodology

1. "Courts regularly affirm the legitimacy of employing differential diagnostic methodology." Fed. Jud. Ctr. Ref. Man. Sci. Evid. (3d Ed. 2011), at 617, n.212.

2. Many Federal courts have recognized Differential Diagnosis as a valid Scientific Method:
  - a. *Etherton v. Owners Ins. Co.*, 2016 WL 3912812 (10<sup>th</sup> Cir. 2016)
  - b. *Johnson v. Mead Johnson & Co.*, 754 F.3d 557, 562 (8<sup>th</sup> Cir. 2014);
  - c. *Messick v. Novartis Pharma. Corp.*, 747 F.3d 1193 (9<sup>th</sup> Cir. 2014);
  - d. *Guinn v. AstraZeneca Pharma., L.P.*, 602 F.3d 1245, 1253 (11<sup>th</sup> Cir. 2010)(when properly conducted, differential diagnosis can be a reliable methodology under *Daubert* and need not rule out all other causes), *but see*; *Hendrix v. Evenflo Co., Inc.*, 609 F. 3d 1183 (11<sup>th</sup> Cir. 2010)(must rule in all every cause);
  - e. *Best v. Lowe's Home Centers, Inc.*, 563 F.3d 171, 177 (6<sup>th</sup> Cir. 2009);
  - f. *Feliciano-Hill v. Principi*, 439 F.3d 18,25 (1<sup>st</sup> Cir. 2006);
  - g. *Clausen v. M/V New Carissa*, 339 F.3d 1049, 1058 (9<sup>th</sup> Cir. 2003);
  - h. *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 262 (4<sup>th</sup> Cir. 1999);
  - i. *McCulloch v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2<sup>nd</sup> Cir. 1995);
3. Other Federal Cases:
  - a. *Etherton v. Owners Ins. Co.*, 35 F.Supp.3d 1360 (D.C.O. 2014);
  - b. *Taylor v. Novartis Pharma. Corp.*, 2013 WL 85168 \* (S.D.Fla.2013) (retained expert testimony on causation is admissible based on performance of differential diagnosis);
  - c. *Whelan v. Royal Caribbean Cruises Ltd.*, 978 F.Supp.2d 1328 (S.D. Fla. 2013); (Pulmonologist included specific criteria assessment along with information gathered in history as a sound methodology citing Fed. Jud. Center, *Reference Manual on Scientific Evidence*, (3d Ed. 2011))
  - d. *Kilpatrick v. Breg, Inc.*, 613 F.3d 129, 1343 (11<sup>th</sup> Cir. 2010) (opinion based on temporal relationship is not a reliable methodology);
  - e. *In re Trasylol Prod. Liability Litigation*, 2010 WL 8354662 \*7 and\*9 (S.D. Fla. 2010) (No need to rule out all other causes);
  - f. *Cohen v. Lockwood*, 2004 WL 763961 \*3 (D.Ka. 2004) (failure to cite specific medical research is not fatal);
  - g. *U.S. v. Frazier*, 387 F.3d 1244 (11<sup>th</sup> Cir 2004)(Criteria for application of scientific method can be used for nonscientific expert testimony- forensic investigator).

## VII. APPLYING DAUBERT STANDARD TO TREATER'S CAUSATION OPINION

1. Qualify Your Treating Physician
2. Remember that 90.702 Includes that the expert testimony is a:
  1. Product of reliable principles and methods,
  2. Reliable application of principles and methods.

3. And keep your treating physician inside his area of expertise.

VIII. Use Three Prong Approach to Establishing Injury Causation – *Etherton v. Owners Ins. Co.*, 35 F.Supp.3d 1360 (D.C.O. 2014) *Dr. Ramos v Dr. Bain*;

1. FIRST Prong: Establish General Causation – Biologic Plausibility or Link
  - a. Is the event in question capable of producing the type of injury suffered.
  - b. Low Threshold – any evidence and unrelated to incidence or prevalence.  
(Example: COPD and smoking – plausible, Trauma and COPD – implausible)
  - c. *Can be supported by medical observation or experience or case studies with small numbers.*
  - d. Use the research references provided below.
2. SECOND Prong: Temporal Relationship Between Exposure and Outcome
  - a. Rely on medical history, diagnostic studies, physical exam findings, other medical records.
  - b. Cannot stand alone. (*Perez v. Bell South Telecommunications, Inc.*, 138 So. 3d 492, 497 (Fla. 3d DCA 2014).
  - c. Apply the facts obtained to the list of plausible causes:
    1. Outcome cannot pre-exist the exposure. (Must be different)
    2. Outcome cannot follow the exposure by a period considered clinically significant or without explanation. (Masking, immobility, fracture/EMG evidence lag).
3. THIRD Prong: Specific Causation – Rule Out More Likely Causes
  - a. Alternative causes can predispose, but must be both biologically plausible AND have a stronger temporal relationship to be a more likely cause.  
(Significant contributing factor)
  - b. Consideration of Degeneration.

IX. Research Resources

1. Fed. Jud. Center, *Reference Manual on Scientific Evidence*, (3d Ed. 2011).
  - a. Download free:  
[http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/\\$file/SciMan3D01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/$file/SciMan3D01.pdf)
2. American Medical Association Guides to the Evaluation of Disease and Injury Causation, (J. Mark Melhourn, M.D., William Ackerman, III, M.D., 1<sup>st</sup> Ed. 2008).
3. American Medical Association Guides to the Evaluation of Permanent Impairment 224 (6<sup>th</sup> Ed. 2007).

4. Freeman, M., Centeno, C., Kohles, S. *A Systematic Approach to Clinical Determinations of Causation in Symptomatic Spinal Disk Injury Following Motor Vehicle Crash Trauma*, 1 Phys. Med. & Rehab. 951 (October 2009).

X. Practice Tips

1. Know and cover the documented history and physical of your clients.
2. Cover materials reviewed.
  - a. provide prior records – send with your client.
  - b. pay for meeting.
  - c. the records should support the history or you must deal with the discrepancies.
3. Cover potential causes considered and ruled out. (a cause not THE cause)
4. Dr. Cannot just say I performed a differential diagnosis. He must describe the process:
  - a. Patient History
  - b. Physical Examination
  - c. Diagnostic Testing
  - d. Prior medical records and records from other treatment post incident
  - e. Consideration of possible causes
  - f. Ruling out alternate causes
  - g. Medical literature – make them aware if they don't know any studies of at least The AMA Guides to Permanent Impairment.
  - h. USE the Three PRONGS.

2016 WL 3912812  
Only the Westlaw citation is currently  
available.  
United States Court of Appeals,  
Tenth Circuit.

Donald L. Etherton, Plaintiff-Appellee,  
v.  
Owners Insurance Company,  
Defendant-Appellant.  
No. 14-1164

|  
July 19, 2016

#### Synopsis

Background: Insured brought action against automobile insurer, alleging Colorado-law claims for breach of contract and unreasonable delay or denial of claim for uninsured-underinsured motorist (UIM) coverage. Insurer removed action on diversity grounds. The United States District Court for the District of Colorado, Marcia S. Krieger, excluded insured's causation expert, and insured moved for reconsideration. Judge Krieger recused herself from the case, and it was reassigned to Judge Brimmer. The District Court, Philip A. Brimmer, J., 2012 WL 4034386, granted insured's motion. After trial, jury rendered verdict in favor of insured on both claims. The District Court, 2013 WL 5443068, granted insured's motion to alter or amend the judgment, and denied insurer's motion for judgment as matter of law and motion for new trial, 35 F.Supp.3d 1360. Insurer appealed.

Holdings: The Court of Appeals, Matheson, Circuit Judge, held that:

[1] reasoning or methodology underlying

expert testimony regarding whether insured's lumbar spine injury plausibly could have been caused by rear-end collision properly could be reliably applied;

[2] consideration of temporal relationship between insured's lumbar spine injury and rear-end collision was appropriate part of expert's broader analysis of whether that injury coincided with collision;

[3] reasoning or methodology underlying expert testimony regarding whether expert considered alternative causes for insured's lumbar spine injury, including degeneration, after rear-end collision properly could be reliably applied;

[4] district court did not abuse its discretion by not discussing or reviewing scientific articles to which expert referred;

[5] testimony of expert regarding whether insured's lumbar spine injury was caused by rear-end collision "fit" the case;

[6] insurer could be liable for reasonable attorney fees and court costs and two times covered benefit for denying first-party claim without reasonable basis;

[7] jury reasonably could have found that insurer's delay or denial of benefits was unreasonable; and

[8] insured's damages for insurer's breach of contract and unreasonable delay or denial of benefits were not limited to two times covered benefit, but court could award three times amount of benefit denied.

Affirmed.

Hartz, Circuit Judge, filed concurring opinion, in which, Gorsuch, Circuit Judge, joined.

## West Headnotes (41)

### [1] Federal Courts

#### ⇒ Expert evidence and witnesses

170BFederal Courts

170BXVIICourts of Appeals  
170BXVII(K)Scope and Extent of Review  
170BXVII(K)2Standard of Review  
170Bk3576Procedural Matters  
170Bk3600Expert evidence and witnesses

The Court of Appeals reviews a district court's application of Daubert for abuse of discretion; the Court of Appeals must afford substantial deference to the district court's application of Daubert. Fed. R. Evid. 702.

#### Cases that cite this headnote

### [2] Federal Courts

#### ⇒ Abuse of discretion in general

170BFederal Courts

170BXVIICourts of Appeals  
170BXVII(K)Scope and Extent of Review  
170BXVII(K)2Standard of Review  
170Bk3563Discretion of Lower Court in General  
170Bk3565Abuse of discretion in general

A court abuses its discretion when its ruling is arbitrary, capricious, whimsical, or manifestly unreasonable or when the Court of Appeals is convinced that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances.

#### Cases that cite this headnote

### [3] Federal Courts

#### ⇒ New Trial, Rehearing, or Reconsideration

170BFederal Courts

170BXVIICourts of Appeals  
170BXVII(K)Scope and Extent of Review  
170BXVII(K)2Standard of Review  
170Bk3576Procedural Matters  
170Bk3606New Trial, Rehearing, or Reconsideration  
170Bk3606(1)In general

A motion for a new trial is reviewed for abuse of discretion.

#### Cases that cite this headnote

### [4] Evidence

#### ⇒ Necessity and sufficiency

157EEvidence

157XIIOpinion Evidence  
157XII(D)Examination of Experts  
157k555Basis of Opinion  
157k555.2Necessity and sufficiency

A trial court's broad discretion under Daubert applies both in deciding how to assess an expert's reliability, including what procedures to utilize in making that assessment, as well as in making the ultimate determination of reliability. Fed. R. Evid. 702.

Cases that cite this headnote

[5] Evidence

⇒ Matters involving scientific or other special knowledge in general  
Evidence

⇒ Necessity and sufficiency

157Evidence

157XIIOpinion Evidence  
157XII(B)Subjects of Expert Testimony  
157k508Matters involving scientific or other special knowledge in general

157Evidence  
157XIIOpinion Evidence  
157XII(D)Examination of Experts  
157k555Basis of Opinion  
157k555.2Necessity and sufficiency

District courts have a gatekeeping function imposed on them to ensure expert testimony is admitted only if it is relevant and reliable. Fed. R. Evid. 702.

Cases that cite this headnote

[6] Evidence

⇒ Matters involving scientific or other special knowledge in general

157Evidence

157XIIOpinion Evidence  
157XII(B)Subjects of Expert Testimony  
157k508Matters involving scientific or other special knowledge in general

The “help the trier of fact” language of the rule of evidence governing expert testimony is a relevance test; even if scientifically valid, the expert testimony must “fit,” i.e., it must relate to a disputed issue in the case. Fed. R. Evid. 702.

Cases that cite this headnote

[7] Evidence

⇒ Matters involving scientific or other special knowledge in general  
Evidence

⇒ Necessity and sufficiency

157Evidence

157XIIOpinion Evidence  
157XII(B)Subjects of Expert Testimony  
157k508Matters involving scientific or other special knowledge in general

157Evidence  
157XIIOpinion Evidence  
157XII(D)Examination of Experts  
157k555Basis of Opinion  
157k555.2Necessity and sufficiency

The reliability determination in the rule of evidence governing expert testimony calls for 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. Fed. R. Evid. 702.

Cases that cite this headnote

[8] Evidence

⇨ Matters involving scientific or other special knowledge in general  
Evidence

⇨ Necessity and sufficiency

157Evidence

157XIIOpinion Evidence  
157XII(B)Subjects of Expert Testimony  
157k508Matters involving scientific or other special knowledge in general

157Evidence  
157XIIOpinion Evidence  
157XII(D)Examination of Experts  
157k555Basis of Opinion  
157k555.2Necessity and sufficiency

When conducting a preliminary assessment of whether the reasoning or methodology underlying expert testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue, district courts applying Daubert have broad discretion to consider a variety of factors other than whether the theory or technique has (1) been or can be tested, (2) been peer-reviewed, (3) a known or potential error rate, (4) standards controlling the technique's operation, and (5) been generally accepted by the scientific community. Fed. R. Evid. 702.

Cases that cite this headnote

[9] Evidence

⇨ Matters involving scientific or other special knowledge in general  
Evidence

⇨ Necessity and sufficiency

157Evidence

157XIIOpinion Evidence  
157XII(B)Subjects of Expert Testimony  
157k508Matters involving scientific or other special knowledge in general

157Evidence  
157XIIOpinion Evidence  
157XII(D)Examination of Experts  
157k555Basis of Opinion  
157k555.2Necessity and sufficiency

When conducting a preliminary assessment of whether the reasoning or methodology underlying expert testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue, the focus must be solely on principles and methodology, not on the conclusions that they generate; the proponent need not prove that the expert is indisputably correct, but instead must show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which sufficiently satisfy the reliability requirements. Fed. R. Evid. 702.

Cases that cite this headnote

[10] Evidence  
] ⇌ Necessity and sufficiency

157Evidence

157XIIOpinion Evidence  
157XII(D)Examination of Experts  
157k555Basis of Opinion  
157k555.2Necessity and sufficiency

A district court is not required to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert; a court may conclude that there is simply too great an analytical gap between the data and the opinion proffered. Fed. R. Evid. 702.

Cases that cite this headnote

[11] Evidence  
] ⇌ Medical testimony  
Evidence  
⇌ References to authorities on subject

157Evidence

157XIIOpinion Evidence  
157XII(D)Examination of Experts  
157k555Basis of Opinion  
157k555.10Medical testimony

157Evidence  
157XIIOpinion Evidence  
157XII(D)Examination of Experts  
157k556References to authorities on subject

Reasoning or methodology underlying expert testimony regarding whether insured's lumbar spine injury plausibly could have been caused by rear-end collision properly could be reliably applied, in insured's action against automobile insurer alleging Colorado-law claims for breach of contract and unreasonable delay or denial of claim for uninsured-underinsured motorist (UIM) coverage, where expert relied on medical literature and his own experience studying spinal injuries from live crash-testing. Fed. R. Evid. 702(d).

Cases that cite this headnote

[12] Evidence  
] ⇌ Medical testimony

157Evidence

157XIIOpinion Evidence  
157XII(D)Examination of Experts  
157k555Basis of Opinion  
157k555.10Medical testimony

Consideration of temporal relationship between insured's lumbar spine injury and rear-end collision was appropriate part of expert's broader analysis of whether that injury coincided with collision, and thus whether expert's corresponding testimony was sufficiently reliable to be admissible in insured's action against automobile insurer alleging Colorado-law claims for breach of contract and unreasonable delay or denial of claim for uninsured-underinsured motorist (UIM) coverage, where expert first concluded that collision plausibly caused insured's injury, he next examined insured's medical records to determine whether injury coincided with collision, and he then considered alternative explanations for injury based on diagnostic testing and insured's medical history and physical examinations, including those conducted immediately after the collision. Fed. R. Evid. 702(c).

Cases that cite this headnote

[13] Evidence  
 ↳ Cause and Effect  
Evidence  
 ↳ Cause and effect

157Evidence

157XIIOpinion Evidence  
 157XII(B)Subjects of Expert Testimony  
 157k526Cause and Effect  
 157k527In general

157Evidence  
 157XIIOpinion Evidence  
 157XII(D)Examination of Experts  
 157k555Basis of Opinion  
 157k555.5Cause and effect

The temporal relationship between an injury and a purported cause can be a relevant factor in a broader causation determination, when conducting a preliminary assessment of whether the reasoning or methodology underlying expert testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue; although correlation alone may be insufficient to establish causation, it is nonetheless relevant to identifying causal relationships. Fed. R. Evid. 702(c).

Cases that cite this headnote

[14] Evidence  
 ↳ Medical testimony

157Evidence

157XIIOpinion Evidence  
 157XII(D)Examination of Experts  
 157k555Basis of Opinion  
 157k555.10Medical testimony

Reasoning or methodology underlying expert testimony regarding whether expert considered alternative causes for insured's lumbar spine injury, including degeneration, after rear-end collision properly could be reliably applied, in insured's action against automobile insurer alleging Colorado-law claims for breach of contract and unreasonable delay or denial of claim for uninsured-underinsured motorist (UIM) coverage; expert concluded that non-traumatic daily activities likely did not cause insured's injuries, he considered degeneration as alternative cause, he maintained that collision was "most likely cause" while noting that insured might have been more susceptible to injury because of degeneration. Fed. R. Evid. 702(d).

Experts must provide objective reasons for eliminating alternative causes when employing a differential analysis which refers to the process by which a physician rules in all scientifically plausible causes of the plaintiff's injury, and the physician then rules out the least plausible causes of injury until the most likely cause remains; this is not to say that an expert, in order to testify on causation, must be able to categorically exclude each and every possible alternative cause, since to require otherwise would mean that few experts would ever be able to testify. Fed. R. Evid. 702.

Cases that cite this headnote

Cases that cite this headnote

[15] Evidence  
] ⇨ Medical testimony

157Evidence

157XIIOpinion Evidence  
157XII(D)Examination of Experts  
157k555Basis of Opinion  
157k555.10Medical testimony

[16] Evidence  
1 ⇨ Cause  
Evidence  
⇨ Medical testimony

157Evidence

157XIIOpinion Evidence  
157XII(B)Subjects of Expert Testimony  
157k526Cause and Effect  
157k528Injuries to the Person  
157k528(1)Cause

157Evidence  
157XIIOpinion Evidence  
157XII(D)Examination of Experts  
157k555Basis of Opinion  
157k555.10Medical testimony

District court did not abuse its discretion by not discussing or reviewing scientific articles to which expert referred when conducting preliminary assessment of whether reasoning or methodology underlying expert's testimony was scientifically valid and whether that reasoning or methodology properly could be applied to facts in issue; court noted that expert's approach was generally accepted in medical community for treatment, it carefully considered, and ultimately rejected, critiques of methodology's specific causation component, it explained that methodology was similar to those previously found reliable, and it acknowledged academic literature. Fed. R. Evid. 702.

Cases that cite this headnote

[17] Evidence

1 ⇌ Matters involving scientific or other special knowledge in general

157Evidence

157XIIOpinion Evidence  
157XII(B)Subjects of Expert Testimony  
157k508Matters involving scientific or other special knowledge in general

A district court has discretion to limit the information upon which it will decide the Daubert issue. Fed. R. Evid. 702.

Cases that cite this headnote

[18] Evidence

1 ⇌ Cause

157Evidence

157XIIOpinion Evidence  
157XII(B)Subjects of Expert Testimony  
157k526Cause and Effect  
157k528Injuries to the Person  
157k528(1)Cause

In insured's action against automobile insurer alleging Colorado-law claims for breach of contract and unreasonable delay or denial of claim for uninsured-underinsured motorist (UIM) coverage, testimony of expert regarding whether insured's lumbar spine injury was caused by rear-end collision was relevant; expert's testimony "fit" the case because he had specialized experience in treating musculoskeletal injuries and studying spinal injuries caused by motor collisions and he testified that collision caused insured's injuries. Fed. R. Evid. 702(a).

Cases that cite this headnote

[19] Federal Courts

1 ⇌ Substance or procedure; determinativeness

170BFederal Courts

170BXVState or Federal Laws as Rules of Decision; Erie Doctrine  
170BXV(A)In General  
170Bk3005Substance or procedure; determinativeness

When jurisdiction is based on the parties' diverse citizenship, a federal court must assess state law claims based on the substantive law of the state. 28 U.S.C.A. § 1332.

Cases that cite this headnote

[20] Federal Courts

- 1 ⇨ Substance or procedure; determinativeness  
Federal Courts  
⇨ Highest court  
Federal Courts  
⇨ Anticipating or predicting state decision

170BFederal Courts

170BXVState or Federal Laws as Rules of Decision;  
Erie Doctrine  
170BXV(A)In General  
170Bk3005Substance or procedure;  
determinativeness

170BFederal Courts  
170BXVState or Federal Laws as Rules of Decision;  
Erie Doctrine  
170BXV(A)In General  
170Bk3006Sources of Authority  
170Bk3008State Courts and Their Decisions in  
General  
170Bk3008(2)Highest court

170BFederal Courts  
170BXVState or Federal Laws as Rules of Decision;  
Erie Doctrine  
170BXV(C)Unsettled or Undecided Questions  
170Bk3103Anticipating or predicting state decision

In a diversity case, the objective of a federal court when interpreting and applying state substantive law is to reach the same result that would be reached in state court; if the state's highest court has interpreted a state statute, the federal court defers to that decision, but if the state's highest court has not interpreted a state statute, it instead predicts how that court would rule. 28 U.S.C.A. § 1332.

Cases that cite this headnote

[21] Federal Courts

- 1 ⇨ Inferior courts

170BFederal Courts

170BXVState or Federal Laws as Rules of Decision;  
Erie Doctrine  
170BXV(A)In General  
170Bk3006Sources of Authority  
170Bk3008State Courts and Their Decisions in  
General  
170Bk3008(3)Inferior courts

In a diversity case, the decisions of lower state courts, while persuasive, are not dispositive; the decision of an intermediate appellate state court is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise. 28 U.S.C.A. § 1332.

Cases that cite this headnote

[22] Federal Courts

- 1 ⇨ State constitutions, statutes, regulations, and ordinances

170BFederal Courts

170BXVState or Federal Laws as Rules of Decision;  
Erie Doctrine  
170BXV(A)In General  
170Bk3006Sources of Authority  
170Bk3010State constitutions, statutes, regulations,  
and ordinances

When interpreting a state statute in a diversity case, a federal court must apply state rules of statutory construction. 28 U.S.C.A. § 1332.

Cases that cite this headnote

[23] Statutes

1 ⇨ Language and intent, will, purpose, or policy

Statutes

⇨ Plain Language; Plain, Ordinary, or Common Meaning

361 Statutes

361III Construction

361III(A) In General

361k1078 Language

361k1080 Language and intent, will, purpose, or policy

361 Statutes

361III Construction

361III(B) Plain Language; Plain, Ordinary, or Common Meaning

361k1091 In general

Under Colorado law, the primary task in construing a statute is to give effect to the intent of the General Assembly, which requires courts to look first to the plain language of the statute. Colo. Rev. Stat. Ann. § 2-4-212.

Cases that cite this headnote

[24] Statutes

1 ⇨ Construing together; harmony

361 Statutes

361III Construction

361III(E) Statute as a Whole; Relation of Parts to Whole and to One Another

361k1155 Construing together; harmony

Under Colorado law, a statute must be read and considered as a whole; where possible, the statute should be interpreted so as to give consistent, harmonious, and sensible effect to all its parts. Colo. Rev. Stat. Ann. § 2-4-101.

Cases that cite this headnote

[25] Federal Courts

1 ⇨ Taking case or question from jury; judgment as a matter of law

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(D) Presentation and Reservation in Lower Court of Grounds of Review

170BXVII(D)2 Particular Grounds of Review

170Bk3406 Matters of Procedure

170Bk3419 Taking case or question from jury; judgment as a matter of law

To seek appellate review of an argument raised at trial in a motion for judgment as a matter of law (JMOL), a party must reassert its argument for JMOL after trial. Fed. R. Civ. P. 50(a), 50(b).

Cases that cite this headnote

[26] Federal Courts

1 ⇨ Taking case or question from jury; judgment as a matter of law

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)2 Standard of Review

170Bk3576 Procedural Matters

170Bk3605 Taking case or question from jury; judgment as a matter of law

The Court of Appeals reviews de novo a district court's decision to grant or deny a motion for judgment as a matter of law, applying the same legal standards as the district court. Fed. R. Civ. P. 50.

Cases that cite this headnote

- [27] Federal Civil Procedure  
1 ➡ Conclusions or inferences from evidence  
Federal Civil Procedure  
➡ Evidence

170AFederal Civil Procedure

170AXVTrial  
170AXV(F)Taking Case or Question from Jury;  
Preverdict Motion for Judgment as Matter of Law  
170AXV(F)2Questions for Jury  
170Ak2152Conclusions or inferences from evidence

170AFederal Civil Procedure  
170AXVIIJudgment  
170AXVII(E)Notwithstanding Verdict; Judgment as  
Matter of Law  
170Ak2608Evidence  
170Ak2608.1In general

Judgment as a matter of law is appropriate only if the evidence points but one way and is susceptible to no reasonable inferences which may support the nonmoving party's position. Fed. R. Civ. P. 50.

Cases that cite this headnote

- [28] Federal Civil Procedure  
1 ➡ Construction of evidence  
Federal Civil Procedure  
➡ Construction of evidence

170AFederal Civil Procedure

170AXVTrial  
170AXV(F)Taking Case or Question from Jury;  
Preverdict Motion for Judgment as Matter of Law  
170AXV(F)1In General  
170Ak2126Determination  
170Ak2127Construction of evidence

170AFederal Civil Procedure  
170AXVIIJudgment  
170AXVII(E)Notwithstanding Verdict; Judgment as  
Matter of Law  
170Ak2608Evidence  
170Ak2609Construction of evidence

On a motion for judgment as a matter of law, a court draws all inferences from the evidence in favor of the non-moving party, and does not weigh the evidence or judge witness credibility. Fed. R. Civ. P. 50.

Cases that cite this headnote

- [29] Insurance  
1 ➡ Duty to settle or pay

217Insurance

217XXVIIClaims and Settlement Practices  
217XXVII(C)Settlement Duties; Bad Faith  
217k3358Settlement by First-Party Insurer  
217k3360Duty to settle or pay

Automobile Insurer could be liable for reasonable attorney fees and court costs and two times covered benefit for denying uninsured/underinsured motorist (UM/UIM) claim without reasonable basis; limiting additional compensation to situations when payment was due and owing would have been void as against public policy. Colo. Rev. Stat. Ann. §§ 10-3-1115(1)(a), 10-3-1116(1).

Cases that cite this headnote

- [30] Insurance  
1 ⇨ Settlement Duties; Bad Faith  
Insurance  
⇨ Reasonableness of insurer's conduct in general

217Insurance

217XXVIIClaims and Settlement Practices  
217XXVII(C)Settlement Duties; Bad Faith  
217k3334In General  
217k3335In general

217Insurance  
217XXVIIClaims and Settlement Practices  
217XXVII(C)Settlement Duties; Bad Faith  
217k3334In General  
217k3336Reasonableness of insurer's conduct in general

Colorado law proscribes an insurer's unreasonable handling of an insured's claim for benefits, not simply the unreasonable delay or denial of payments the insurer has determined are owed. Colo. Rev. Stat. Ann. § 10-3-1115.

Cases that cite this headnote

- [31] Insurance  
1 ⇨ Settlement Duties; Bad Faith

217Insurance

217XXVIIClaims and Settlement Practices  
217XXVII(C)Settlement Duties; Bad Faith  
217k3334In General  
217k3335In general

Colorado law provides a right of action for an insurer's unreasonable delay or denial of claims. Colo. Rev. Stat. Ann. §§ 10-3-1115, 10-3-1116.

Cases that cite this headnote

- [32] Insurance  
1 ⇨ Reasonableness of insurer's conduct in general

217Insurance

217XXVIIClaims and Settlement Practices  
217XXVII(C)Settlement Duties; Bad Faith  
217k3334In General  
217k3336Reasonableness of insurer's conduct in general

Under Colorado law, insurer could unreasonably delay or deny claim for benefits even if that claim was fairly debatable. Colo. Rev. Stat. Ann. § 10-3-1115.

Cases that cite this headnote

- [33] Insurance  
1 ⇨ Reasonableness of insurer's conduct in general

217Insurance

217XXVIIClaims and Settlement Practices  
217XXVII(C)Settlement Duties; Bad Faith  
217k3334In General  
217k3336Reasonableness of insurer's conduct in general

Under Colorado law, an insurer's delay or denial of benefits is not necessarily reasonable simply because the claim for benefits was fairly debatable; if a reasonable person would find that the insurer's justification for denying or delaying payment of a claim was fairly debatable, this weighs against a finding that the insurer acted unreasonably, but fair debatability is not a threshold inquiry that is outcome determinative. Colo. Rev. Stat. Ann. § 10-3-1115.

Cases that cite this headnote

[34] Insurance  
1 ⇨ Questions of law or fact

217Insurance

217XXVII Claims and Settlement Practices  
217XXVII(C) Settlement Duties; Bad Faith  
217k3378 Actions  
217k3382 Questions of law or fact

Jury reasonably could have found that insurer's delay or denial of uninsured/underinsured motorist (UM/UIM) benefits was unreasonable under Colorado law, and thus insurer was liable for reasonable attorney fees and court costs and two times covered benefit, where insured's expert testified that insurer denied insured's claim before investigating it and it did not provide reasonable explanation for its \$150,000 offer. Colo. Rev. Stat. Ann. §§ 10-3-1104(1)(h)(IV), 10-3-1104(1)(h)(XIV), 10-3-1115.

Cases that cite this headnote

[35] Insurance  
1 ⇨ Reasonableness of insurer's conduct in general

217Insurance

217XXVII Claims and Settlement Practices  
217XXVII(C) Settlement Duties; Bad Faith  
217k3334 In General  
217k3336 Reasonableness of insurer's conduct in general

Under Colorado law, the reasonableness of an insurer's conduct in delaying or denying claim for benefits is determined objectively, based on proof of industry standards. Colo. Rev. Stat. Ann. § 10-3-1115.

Cases that cite this headnote

[36] Insurance  
1 ⇨ Reasonableness of insurer's conduct in general

217Insurance

217XXVII Claims and Settlement Practices  
217XXVII(C) Settlement Duties; Bad Faith  
217k3334 In General  
217k3336 Reasonableness of insurer's conduct in general

Colorado insurance regulations only provide minimum standards to avoid penalties; although an insurer may act unreasonably in delaying or denying benefits if it violates the regulation, an insurer does not necessarily act reasonably if it meets the regulation's minimum standards. Colo. Rev. Stat. Ann. §§ 10-3-1115, 10-3-1116.

Cases that cite this headnote

[37] Insurance  
1 ⇨ Punitive or multiple damages

217Insurance

217XXVIIClaims and Settlement Practices  
217XXVII(C)Settlement Duties; Bad Faith  
217k3373Amount and Items Recoverable  
217k3376Punitive or multiple damages

Under Colorado law, insured's damages for insurer's breach of contract and unreasonable delay or denial of uninsured/underinsured motorist (UM/UIM) benefits were not limited to two times covered benefit, but court could award three times amount of benefit denied; although statute allowed two times covered benefit as recovery for unreasonable delay or denial of payment, statutorily authorized action was in addition to other actions available by statute or common law, and although statute also stated that damages "awarded pursuant to this section" were not recoverable in any other action or claim, insured's recovery of benefit owed was awarded pursuant to common law claim for breach of contract. Colo. Rev. Stat. Ann. § 10-3-1116.

Cases that cite this headnote

[38] Federal Courts

1 ⇨ Altering, amending, modifying, or vacating judgment or order; proceedings after judgment

170BFederal Courts

170BXVIICourts of Appeals  
170BXVII(K)Scope and Extent of Review  
170BXVII(K)2Standard of Review  
170Bk3576Procedural Matters  
170Bk3607Altering, amending, modifying, or vacating judgment or order; proceedings after judgment

The Court of Appeals reviews a decision on a motion to amend the judgment for abuse of discretion. Fed. R. Civ. P. 59(e).

Cases that cite this headnote

[39] Federal Courts

1 ⇨ Altering, amending, modifying, or vacating judgment or order; proceedings after judgment

170BFederal Courts

170BXVIICourts of Appeals  
170BXVII(K)Scope and Extent of Review  
170BXVII(K)2Standard of Review  
170Bk3576Procedural Matters  
170Bk3607Altering, amending, modifying, or vacating judgment or order; proceedings after judgment

To reverse a decision on a motion to amend the judgment, the Court of Appeals must have a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances. Fed. R. Civ. P. 59(e).

Cases that cite this headnote

[40] Federal Courts

1 ⇨ Abuse of discretion in general

170BFederal Courts

170BXVIICourts of Appeals  
170BXVII(K)Scope and Extent of Review  
170BXVII(K)2Standard of Review  
170Bk3563Discretion of Lower Court in General  
170Bk3565Abuse of discretion in general

The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions.

Plaintiff–Appellee.

Before HARTZ, GORSUCH, and MATHESON, Circuit Judges.

Cases that cite this headnote

MATHESON, Circuit Judge.

[41] Federal Courts

1 Statutes, regulations, and ordinances, questions concerning in general

170BFederal Courts

170BXVIICourts of Appeals

170BXVII(K)Scope and Extent of Review

170BXVII(K)2Standard of Review

170Bk3574Statutes, regulations, and ordinances, questions concerning in general

Pure questions of statutory interpretation are reviewed de novo.

Cases that cite this headnote

## I. INTRODUCTION

\*1 On December 19, 2007, a driver rear-ended Donald Etherton's vehicle. The collision injured Mr. Etherton's back. He filed a claim with his insurer, Owners Insurance Company ("Owners"), seeking uninsured or underinsured motorist coverage up to his policy limit. After months of back and forth, Owners offered to pay an amount significantly lower than the policy limit. Mr. Etherton sued, alleging claims for (1) breach of contract and (2) unreasonable delay or denial of a claim for benefits under Colo. Rev. Stat. §§ 10-3-1115 and -1116.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 1:10-CV-00892-PAB-KLM)

A jury found in Mr. Etherton's favor on both claims. The district court entered judgment for Mr. Etherton, awarding \$2,250,000 in damages. Owners appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

Attorneys and Law Firms

Gregory R. Giometti (Amanda Burke, with him on the briefs), Gregory R. Giometti & Associates, P.C., Denver, Colorado, appearing for Defendant–Appellant.

## II. BACKGROUND

Ethan A. McQuinn (Chad P Hemmat, and Jason G. Alleman, with him on the brief), Anderson, Hemmat & McQuinn, LLC, Greenwood Village, Colorado appearing for

### A. Factual History

Mr. Etherton filed his claim with Owners on

July 6, 2009. His policy included uninsured or underinsured motorist coverage up to \$1,000,000. The other driver's insurer settled with Mr. Etherton for \$250,000. Mr. Etherton's claim to Owners requested payment up to \$750,000, the remainder of his policy limit. Mr. Etherton's vehicle had only minor damage, but he underwent three back surgeries to repair disc damage in his spine.

Between July and December of 2009, Mr. Etherton and Owners communicated frequently. Owners repeatedly indicated it needed additional information to assess his claim. On December 30, 2009, Owners offered to settle for \$150,000. Mr. Etherton asked Owners to explain the basis for the low offer. On January 19, 2010, Owners responded, "Our 150k offer is based on the documentation you have provided to date.... We note serious questions of causation of Mr. Etherton's injuries...." App. Vol. XII at 2982. Many additional communications between Mr. Etherton and Owners failed to resolve the matter. Mr. Etherton initiated this suit in March 2010.

### *B. Procedural History*

Mr. Etherton sued in Colorado state court. Owners removed the action to federal court, where it was assigned to Judge Krieger.

As trial approached, Owners filed a motion in limine under Federal Rule of Evidence 702, seeking to exclude Dr. Joseph Ramos, Mr. Etherton's causation expert. Owners argued Dr. Ramos's methodology was not reliable under Rule 702 and Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993). After a Federal Rule of Evidence 104(a) Daubert hearing, Judge Krieger ruled from the bench and excluded Dr. Ramos's testimony, concluding his methodology was not reliable. Shortly thereafter, Mr. Etherton moved for

reconsideration.

Judge Krieger recused herself from the case, and it was reassigned to Judge Brimmer, who granted Mr. Etherton's motion to reconsider. Based upon his review of the Daubert hearing transcript, Judge Brimmer concluded Dr. Ramos's methodology was reliable and he therefore could testify.

The court held a six-day jury trial. At the close of evidence, Owners moved for judgment as a matter of law on Mr. Etherton's claim for the unreasonable delay or denial of an insurance claim under Colo. Rev. Stat. §§ 10-3-1115 and -1116. The court denied the motion. The jury returned a verdict in Mr. Etherton's favor on his claims for breach of contract and unreasonable delay or denial. The jury found Mr. Etherton's noneconomic losses were \$375,000, his economic losses were \$857,000, and his physical impairment and disfigurement damages were \$150,000. The district court initially entered judgment for a total of \$1,500,000. It concluded Mr. Etherton was entitled to \$750,000 in breach of contract damages for the remainder of his policy limit, and an additional \$750,000 for the unreasonable delay or denial claim under Colo. Rev. Stat. § 10-3-1116.

\*2 Owners filed a motion seeking a new trial under Federal Rule of Civil Procedure 59 and renewing its motion for judgment as a matter of law under Federal Rule of Civil Procedure 50. For a new trial, Owners argued the district court had erroneously admitted Dr. Ramos's unreliable expert testimony. For judgment as a matter of law on Mr. Etherton's unreasonable delay or denial claim, it argued that without Dr. Ramos's erroneously admitted testimony, Mr. Etherton failed to prove causation. The court rejected these arguments and denied the motion.

Mr. Etherton moved to amend the judgment under Rule 59(e), arguing Colo. Rev. Stat. §

10-3-1116 permits not just an award of his breach of contract damages multiplied by two, but double his covered benefits in addition to any award for breach of contract damages. The district court granted the motion and amended the judgment to award Mr. Etherton \$2,250,000. This amount includes (1) \$750,000 for breach of contract, the amount remaining on Mr. Etherton's policy limit, and (2) \$1,500,000 for the unreasonable delay or denial claim. The court arrived at the latter figure by doubling the amount of covered benefits, which was the \$750,000 left on his \$1,000,000 policy after receiving \$250,000 from the other driver's insurer.

Owners filed a timely notice of appeal. *See Fed. R. App. P. 4(a)(1)(A)*. After oral argument, we sua sponte abated this appeal pending issuance of the Colorado Supreme Court's decision in *American Family Mutual Insurance Co. v. Hansen*, No. 14SC99. The Colorado Supreme Court's grant of certiorari in *Hansen* included two state law questions relevant to this appeal: (1) whether an insurer's denial of a "fairly debatable" claim can be unreasonable, and (2) whether Colo. Rev. Stat. § 10-3-1116 permits an insured whose claim has been unreasonably denied to recover the benefit itself plus a penalty of two times that benefit. *Hansen*, --- P.3d ---, --- n. 3, 2016 WL 3398507, at \*5 n. 3 (Colo. June 20, 2016). On June 20, 2016, the Colorado Supreme Court decided *Hansen* on alternative grounds and did not reach either of the questions relevant to Mr. Etherton's case. *Id.* at ---, 2016 WL 3398507 at \*7.

### III. DISCUSSION

Owners appeals the district court's decision (a) denying Owners' motion for a new trial based on the alleged erroneous admission of Dr. Ramos's testimony under Rule 702. Regarding the state-law claims, Owners appeals the district court's decisions (b) denying Owners' motion for judgment as a matter of law based on

Owners' purported reasonableness, and (c) granting Mr. Etherton's motion to amend the judgment. We affirm on each issue.

#### A. Motion for New Trial—Rule 702

Owners does not contest the Rule 702/*Daubert* standard the district court used to assess Dr. Ramos's testimony. It argues the court erred in applying that standard. We disagree and therefore affirm.

##### 1. Standard of Review

[1] [2] [3] We review a district court's application of Rule 702/ *Daubert* for abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 138–39, 118 S.Ct. 512, 139 L.Ed.2d 508 (1997).<sup>1</sup> "We must afford substantial deference to the district court's application of *Daubert*." *Hollander v. Sandoz Pharm. Corp.*, 289 F.3d 1193, 1204 (10th Cir. 2002) (citing *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 143 L.Ed.2d 238 (1999)); accord *Bitler v. A.O. Smith Corp.*, 400 F.3d 1227, 1232 (10th Cir. 2004) (recognizing "the wide latitude a district court has in exercising its discretion to admit or exclude expert testimony"). A court abuses its discretion when its ruling is "arbitrary, capricious, whimsical or manifestly unreasonable or when we are convinced that the district court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1223 (10th Cir. 2003) (quotations omitted).

<sup>1</sup> This issue is nested in Owners' appeal of the district court's denial of the motion for a new trial, which we also review for abuse of discretion. *Mathis v. Huff & Puff Trucking, Inc.*, 787 F.3d 1297, 1308 (10th Cir. 2015). Any reversible defect in the district court's Rule 702 analysis would be a "clear error of judgment or exceed[ ] the bounds of permissible choice in the circumstances," *Weese v. Schukman*, 98 F.3d 542, 549 (10th Cir. 1996), warranting reversal of the court's denial of a new trial.

\*3 [4] "The trial court's broad discretion applies both in deciding how to assess an expert's

reliability, including what procedures to utilize in making that assessment, as well as in making the ultimate determination of reliability.” Goebel v. Denver & Rio Grande W. R.R. Co., 346 F.3d 987, 990 (10th Cir. 2003). As the Supreme Court said in Kumho Tire, “The trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable.” 526 U.S. at 152, 119 S.Ct. 1167.

When applying Rule 702, “different courts relying on essentially the same science may reach different results,” but we could still affirm both decisions due to our “deferential standard of review.” Hollander, 289 F.3d at 1206.

## 2. Legal Background

Federal Rule of Evidence 702 states:

A witness who is qualified as an expert by knowledge, skill, experience, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

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

(d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. Owners challenges the reliability of Dr. Ramos's methodology, not his

qualifications, so we focus on Rule 702's reliability requirements.

[5] [6] Rule 702 imposes a gatekeeping function on district courts to ensure expert testimony is admitted only if it is relevant and reliable. See Kumho Tire, 526 U.S. at 141, 119 S.Ct. 1167; Daubert, 509 U.S. at 597, 589, 113 S.Ct. 2786. The “help the trier of fact” language of Rule 702 is a relevance test for expert testimony. See Daubert, 509 U.S. at 591, 113 S.Ct. 2786. Even if scientifically valid, the expert testimony must “fit”—it must relate to a disputed issue in the case. Id. at 591–92, 113 S.Ct. 2786.

[7] [8] The reliability determination calls for 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.” Daubert, 509 U.S. at 592–93, 113 S.Ct. 2786. These two steps are codified in Rules 702(c) and 702(d). Although many factors may bear on whether expert testimony is based on sound methods and principles, the Daubert Court offered five non-exclusive considerations: whether the theory or technique has (1) been or can be tested, (2) been peer-reviewed, (3) a known or potential error rate, (4) standards controlling the technique's operation, and (5) been generally accepted by the scientific community. See 509 U.S. at 593–94, 113 S.Ct. 2786. “[D]istrict courts applying Daubert have broad discretion to consider a variety of other factors.” Hollander, 289 F.3d at 1205. As the Court said in Kumho Tire,

[W]e can neither rule out, nor rule in, for all cases and for all time the applicability of the factors mentioned in Daubert, nor can we now do so for subsets of cases categorized by category of expert or by kind of evidence. Too much depends on the particular

circumstances of the particular case  
at issue.

526 U.S. at 150, 119 S.Ct. 1167.<sup>2</sup>

2

Drawing from court opinions both before and after *Daubert*, the advisory committee note to the 2000 amendment of Rule 702 mentions additional factors. Fed. R. Evid. 702 advisory committee's note to 2000 amendment.

[9] [10] "The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595, 113 S.Ct. 2786. "The plaintiff need not prove that the expert is undisputably correct.... Instead, the plaintiff must show that the method employed by the expert in reaching the conclusion is scientifically sound and that the opinion is based on facts which sufficiently satisfy Rule 702's reliability requirements." *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10th Cir. 1999) (citation omitted). Neither Rule 702 nor *Daubert* "requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *Joiner*, 522 U.S. at 146, 118 S.Ct. 512.

### 3. *Daubert* Hearings and the District Court's Rulings

\*4 Judge Krieger held Rule 104(a) *Daubert* hearings on August 17, 2011, and November 17, 2011, to determine the admissibility of the parties' various expert witnesses. During the second hearing, Owners challenged the reliability of the methodology Dr. Ramos used to form his opinion that Mr. Etherton's "injuries, including lumbar disc protrusion, lumbar facet syndrome, lower extremity paresthesia, lumbar radiculopathy, SI joint dysfunction, myofascial hypertonicity and muscle spasm, and myelopathy of the lower extremities, were entirely caused by the subject collision." App. Vol. I at 108. Dr. Ramos testified about his

methodology as follows:

In every case you have to start with a good history, thorough history, a thorough physical examination, a review of any diagnostic studies. You have to look at the records as they apply, if there is a previous record of injury. That's important, particularly if it's one that was existing at the time. And you have to use the medical literature and the knowledge base that you gain as a [ ] physician and apply to that.

Now, where that's summarized in the medical literature as far as causation analysis is basically summarized as three major—I guess the macroscopic view of a good history, a good physical examination, and evaluation of the diagnostics, review of preexisting records or preexisting injury history—how that's applied macroscopically is that we look as physicians to say: Is the injury plausible? That's the simplest, first question. And essentially that's asking, Is this possible? It's usually a fairly low hurdle to clear, and it's usually fairly simple.

The second thing that we ask is is there a temporal relation between the injuries, the patient's pain complaints that we have found through that history and that physical examination, those other things that I've identified. Is there a temporal relationship of that to an event?

If the injury is plausible, there is a temporal relationship, we ask a final question, which is: Is there a more likely cause? Is something else more likely that we can attribute to this?

And by following that analysis out, what you gather with those underlying areas that I've outlined, you come to a determination of causation....

App. Vol. V at 1454-55. In short, Dr. Ramos

employed a three-step methodology to determine the injury's cause.

First, he determined whether it is plausible that a collision caused the back injury. This step is easily satisfied, he explained, because “[t]here is a lot of literature that shows very specifically if you get rear-ended, you injure your back. Yes, very specifically: disc herniations, facet injuries, absolutely.” App. Vol. V at 1475.

Second, he assessed whether a collision likely caused the specific injury by reviewing diagnostic studies, examining the injured person's medical history and physical examinations, and determining whether the collision occurred just before back pain commenced. App. Vol. V at 1485 (“I would want physical exam findings that would coordinate; that would suggest a temporal relation of time; that physical exam coordinates. I've mentioned diagnostic studies as well that are reviewed as part of the medical records.”).

Third, he considered whether other, more likely causes produced the injury by reviewing the person's medical history, physical examinations, and any other available information. He testified, “My methodology would include anything else that would be a more likely cause or a better alternative cause for the condition [a patient] was presenting for. And so that would include the intervening events, anything else essentially that would be a more likely cause.” App. Vol. V at 1487. He stated his methodology accounted for the possibility that degeneration caused Mr. Etherton's injuries, and noted “the medical literature would suggest he's at a higher risk for this [type of injury] due to those degenerative changes.” *Id.*

\*5 Dr. Ramos testified the medical community generally accepts his methodology, which is based on peer-reviewed medical literature studying live crash-testing and on his experience

studying the cadavers of people who died in motor collisions. Although he said error rates are a “Pandora's box” in the area of causation determination, the literature “outline[s] the frequency with which people get injured with these things, rear-end impacts particularly.... And based on that, certainly you could come out with—with error or not error....” App. Vol. V at 1457-58.

Judge Krieger ruled from the bench that Dr. Ramos's methodology was unreliable and excluded his testimony. She explained Dr. Ramos's methodology was generally accepted in the medical community for treatment purposes, but his methodology did not exclude alternative explanations or causes or include a step to ensure alternative causes are considered. She said Dr. Ramos's methodology was analytically deficient because it purported to demonstrate specific causation based on general population-wide results without consideration of the specifics of Mr. Etherton's collision. Finally, she noted the absence of evidence on rates of error.

On June 7, 2012, Judge Krieger recused herself from the case. It was reassigned to Judge Brimmer. On September 13, 2012, he agreed to revisit the admissibility of Dr. Ramos's testimony. Upon reconsideration, Judge Brimmer determined Dr. Ramos's testimony was reliable and therefore admissible. He concluded Dr. Ramos's methodology is well accepted in the medical community for medical treatment purposes, and the methodology was reliably applied in this case, including that Dr. Ramos accounted for alternative explanations for the cause of Mr. Etherton's injury. He also concluded Dr. Ramos did not improperly extrapolate his conclusion from general population-wide results and instead employed a reliable causation methodology.

The case proceeded to trial, where Dr. Ramos testified and a jury found in favor of Mr. Etherton. Owners moved for a new trial, arguing

the court erred by admitting Dr. Ramos's testimony. The court denied the motion.

#### 4. Analysis

Owners contends Dr. Ramos's testimony should have been excluded because (a) the academic literature he cited did not support the first step, (b) the second step relied on the logical fallacy that correlation is causation, and (c) the differential diagnosis in the third step was incomplete. Owners also asserts (d) the district court abused its discretion in exercising its gatekeeping function by failing to review the scientific articles cited by Dr. Ramos. These arguments do not specify whether they are based on Rule 702(c)—the reliability of his principles and methods—or Rule 702(d)—the reliable application of his principles and methods. We will try to sort that out in our analysis. Finally, Owners argues (e) Dr. Ramos's testimony was not helpful under Rule 702(a) because it lacked “fit” for this case.

##### *a. Step one was not based on an unsupported assumption*

[11] Owners argues Dr. Ramos's first step simply assumed, without scientific support, that any motor collision can cause the type of injuries suffered by Mr. Etherton. This argument does not question reliance on academic literature as a general matter, but does challenge Dr. Ramos's reliance as to Mr. Etherton. It is therefore a Rule 702(d) challenge. Dr. Ramos's Daubert hearing testimony indicates he appropriately relied on pertinent publications.

Dr. Ramos testified that the first step asks, “Is the injury plausible? ... It's usually a fairly low hurdle to clear, and it's usually fairly simple.” App. Vol. V at 1455. He explained that “the medical literature is rampant with evidence that rear-end-impact motor vehicle crashes can lead to lumbar spine injury. That peer-reviewed literature clears the plausibility hurdle....” *Id.* at 1470; *see also id.* at 1472-73 (“[T]he medical literature would suggest that the velocity is not

a reliable predictor of injury, [and] damage to a vehicle is not a reliable predictor of injury.”); *id.* at 1475 (“There is a lot of literature that shows very specifically if you get rear-ended, you injure your back. Yes, very specifically: disc herniations, facet injuries, absolutely.”).

\*6 Moreover, Dr. Ramos relied on more than academic literature. He testified,

I've also been an instructor at the Spine Research Institute in San Diego. That's particularly relevant to this case here, because it's largely a biomechanical course. ... This is one of the few places in the United States ... that did live human crash test studies, where they actually put occupants into cars, put in black boxes that were donated by various automobile companies, put in seats donated by various automobile companies. We did very high quality research on the kinematics to an occupant of a car at different speeds, at different vectors, at different angles. I was a lecturer at that particular seminar for three years, about.

App. Vol. V at 1451.

In light of Dr. Ramos's reliance on medical literature and his own experience studying spinal injuries from live crash-testing, we disagree with Owners that the first step of his methodology is based on an unsupported assumption.

##### *b. Step two did not mistake correlation for causation*

[12] Owners argues the second step mistakenly attempted to establish

causation only by identifying correlation between Mr. Etherton's collision and injury. This argument challenges Dr. Ramos's reliance on correlation generally, and is therefore a Rule 702(c) challenge. Owners overstates the role of this step. Dr. Ramos did not rely solely on temporal proximity to determine specific causation.

[13] Although correlation alone may be insufficient to establish causation, *see, e.g., Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 885 (10th Cir. 2005) ("A correlation does not equal causation."); *Goebel*, 346 F.3d at 999 ("The court is not permitted to ... rely on the temporal relationship [between an injury and a purported cause] by itself as evidence of causation."), it is nonetheless relevant to identifying causal relationships. Indeed, it may be "a necessary but not sufficient condition for causation." Joseph F. Healey, *The Essentials of Statistics* 350 (4th ed. 2015); *see also United States v. Valencia*, 600 F.3d 389, 425 (5th Cir. 2010) ("Evidence of mere correlation, even a strong correlation, is often spurious and misleading when masqueraded as causal evidence, because it does not adequately account for other contributory variables. However where evidence of correlation itself is potentially relevant and unlikely to mislead the jury, an expert who reliably discerns this relationship can present such conclusions to the jury."). The temporal relationship between an injury and a purported cause can be a relevant factor in a broader causation determination. *See, e.g., Goebel*, 346 F.3d at 999.

Temporality was only one factor in Dr. Ramos's three-step methodology. He first concluded the collision plausibly caused Mr. Etherton's injury. He next examined Mr. Etherton's medical

records<sup>3</sup> to determine whether the injury coincided with the collision. He then considered alternative explanations for the injury based on diagnostic testing and Mr. Etherton's medical history and physical examinations, including those conducted immediately after the collision.

<sup>3</sup>

Owners also argues the second step of Dr. Ramos's methodology is unreliable because it depends on self-reported and subjective data reported by Mr. Etherton. But Dr. Ramos's testimony clearly indicates this step was based on Mr. Etherton's medical records, which included physical examinations and an MRI, and consequently were not solely dependent on self-reported data.

\*7 Dr. Ramos therefore did not rely solely on correlation. Instead, the second step considered whether Mr. Etherton's injuries coincided with the purported cause. The temporal relationship between an injury and its potential cause is relevant because, if Dr. Ramos had found no correlation between the injury and the collision, that could indicate no causal relationship. Dr. Ramos's consideration of the temporal relationship between Mr. Etherton's injury and the collision was an appropriate part of his broader analysis.

#### c. Step three accounted for alternative causes

[14] Owners argues Dr. Ramos incorrectly applied differential diagnosis at step three by ruling out unlikely alternative causes but not likely ones. Owners specifically contends Dr. Ramos considered only traumatic alternative explanations and failed to account for degeneration.<sup>4</sup> This is a Rule 702(d) challenge.

<sup>4</sup>

Owners also contends the third step is unreliable because it is predicated on step one being reliable. This argument fails because we reject Owners' challenge to step one.

[15] This court has recognized that differential diagnosis can reliably determine causation. *See Bitler*, 400 F.3d at 1236; *Goebel*, 346 F.3d at 1000. Owners does not contest the reliability of the method itself. "Differential diagnosis refers to the process by which a physician rules in all

scientifically plausible causes of the plaintiff's injury. The physician then rules out the least plausible causes of injury until the most likely cause remains." *Hollander*, 289 F.3d at 1209 (quotations and alterations omitted). "Experts must provide objective reasons for eliminating alternative causes when employing a differential analysis." *Bitler*, 400 F.3d at 1237 (quotations omitted). "[B]ut this is not to say that an expert, in order to testify on causation, must be able to categorically exclude each and every possible alternative cause—to require otherwise would mean that few experts would ever be able to testify." *Id.* at 1238 n. 6 (quotations and alterations omitted).

Contrary to Owners' position, Dr. Ramos did consider alternative causes for Mr. Etherton's injuries, including degeneration. Dr. Ramos testified that he ruled out alternative explanations based on "my history with Mr. Etherton, my findings on physical examination, the diagnostic testing that I had available to me through the course of his care, [and] the lack of predated records that would otherwise steer me that his condition had preexisted." App. Vol. V at 1458. In so doing, Dr. Ramos considered "anything else that would be a more likely cause or a better alternative cause for the condition [Mr. Etherton] was presenting for," including degeneration due to genetics or aging. *Id.* at 1487.

Dr. Ramos concluded non-traumatic daily activities did not likely cause Mr. Etherton's injuries because "the medical literature would suggest that ... the more likely cause would be a traumatic force." *Id.* at 1489. Dr. Ramos also acknowledged that "the medical literature would suggest [Mr. Etherton is] at a higher risk for [injury] due to those degenerative changes," *id.* which confirms he considered degeneration as an alternative cause. He maintained that the collision was the "most likely cause," *see Hollander*, 289 F.3d at 1209, while noting Mr. Etherton might have been more susceptible to injury because of degeneration. Rule 702 does

not demand that Dr. Ramos "categorically exclude each and every possible alternative cause," *Bitler*, 400 F.3d at 1238 n. 6 (quotations omitted), including degeneration, to testify to causation.

\*8 Moreover, when the court denied Owners' motion for a new trial, it relied on the following deposition testimony from Dr. Ramos refuting the possibility that Mr. Etherton's injury was due solely to degeneration: "[I]t's likely that Mr. Etherton had some degenerative changes in his low back associated with just age and time that were mild," but "a disk as is described in April of '08 that starts to lateralize to the right, that's more concerning that maybe there was some compressive forces across his degenerative disk that forced it to the right and that may be more crash related." App. Vol. IV at 1156-57.

Dr. Ramos considered alternative explanations for Mr. Etherton's injuries. He ruled them out based on his physical examination of Mr. Etherton and his assessment of Mr. Etherton's medical history. Concluding Dr. Ramos complied with Rule 702(d) was within the district court's discretion.

*d. Failure to review Dr. Ramos's scientific articles was not an abuse of discretion*

[16] During the Daubert hearing, Dr. Ramos testified that academic literature supported his causation methodology. He identified multiple sources. Owners complains the district court did not discuss or even review this material, which is a challenge to the court's Rule 702 review.

[17] "[A] district court has discretion to limit the information upon which it will decide the Daubert issue...." *Dodge*, 328 F.3d at 1228; *see Goebel*, 346 F.3d at 990 (recognizing the district courts' broad discretion in deciding how to assess an expert's reliability). The district court noted that Dr. Ramos's approach is generally accepted in the medical community for

treatment. It carefully considered—and ultimately rejected—critiques of the methodology's specific causation component. It explained that the methodology is similar to those previously found reliable in this circuit. And it acknowledged the academic literature when denying Owners' motion for a new trial. The court's analysis indicates it adequately considered whether Dr. Ramos's methodology was scientifically sound and reliably applied. We afford substantial deference to its reasoned conclusion that his testimony was reliable and conclude the court did not abuse its discretion.

*e. Dr. Ramos's methodology properly "fit"*

[18] Owners argues Dr. Ramos's methodology lacked "fit" for demonstrating causation, and was therefore not helpful. This is a Rule 702(a) challenge. Owners contends Dr. Ramos's methodology may be accepted for treatment but is not reliable for tort causation determinations because identifying the precise cause of an injury is not a critical element of treatment.

"Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." Daubert, 509 U.S. at 591, 113 S.Ct. 2786 (quotations omitted). Daubert described such testimony as lacking "fit." See *id.* " 'Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes." *Id.*

Owners cites only Ralston v. Smith & Nephew Richards, Inc., 275 F.3d 965 (10th Cir. 2001), in which this court considered whether a district court erred by excluding an expert's testimony because the proposed expert was not qualified. *Id.* at 969–70. The putative witness was a board-certified orthopedic surgeon whose opinions about a specialized topic (intramedullary nailing) were based only on general orthopedic and surgical principles and concepts. *Id.* She had admitted having little or no knowledge about the specialized subject and

conceded she was not an expert in that area. *Id.* at 969. We affirmed, explaining that "merely possessing a medical degree is not sufficient to permit a physician to testify concerning any medical-related issue." *Id.*

\*9 Ralston is inapposite. Dr. Ramos's qualifications are not contested. His opinions about Mr. Etherton's injuries did not rely solely on generalized knowledge but also on his specialized experience treating musculoskeletal injuries and studying spinal injuries caused by motor collisions. Moreover, Dr. Ramos testified the collision caused Mr. Etherton's injuries—a central issue. His testimony "fit" the case.

In sum, the district court properly applied Rule 702/Daubert to Dr. Ramos's testimony and did not abuse its discretion.

### *B. State–Law Claims*

Owners also appeals the district court's decisions denying Owners' motion for judgment as a matter of law and granting Mr. Etherton's motion to amend the judgment. Both motions relate to Mr. Etherton's state-law claims.

[19] [20] [21] When jurisdiction is based on the parties' diverse citizenship, a federal court must assess state law claims based on the substantive law of the state. Macon v. United Parcel Serv., Inc., 743 F.3d 708, 713 (10th Cir. 2014). Our objective when interpreting and applying state substantive law is to reach the same result that would be reached in state court. Commonwealth Prop. Advocates, LLC v. Mortg. Elec. Registration Sys., Inc., 680 F.3d 1194, 1204 (10th Cir. 2011). If the state's highest court has interpreted a state statute, we defer to that decision. See Long v. St. Paul Fire & Marine Ins. Co., 589 F.3d 1075, 1081 (10th Cir. 2009). If the state's highest court has not interpreted a state statute, we instead predict how that court

would rule. Valley Forge Ins. Co. v. Health Care Mgmt. Partners, Ltd., 616 F.3d 1086, 1093 (10th Cir. 2010). “The decisions of lower state courts, while persuasive, are not dispositive.” Long, 589 F.3d at 1081. “The decision of an intermediate appellate state court is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.” Stickley v. State Farm Mut. Auto Ins. Co., 505 F.3d 1070, 1077 (10th Cir. 2007) (quotations omitted).

[22] [23] [24] “When interpreting a state statute in a diversity case, this court must apply state rules of statutory construction.” United Rentals Nw., Inc. v. Yearout Mech., Inc., 573 F.3d 997, 1001 (10th Cir. 2009). Under Colorado law, the “primary task in construing a statute is to give effect to the intent of the General Assembly,” which requires courts to “look first to the plain language of the statute.” Farmers Grp., Inc. v. Williams, 805 P.2d 419, 422 (Colo. 1991); see Colo. Rev. Stat. § 2-4-212. “[A] statute must be read and considered as a whole. Where possible, the statute should be interpreted so as to give consistent, harmonious, and sensible effect to all its parts.” People v. Dist. Court, 713 P.2d 918, 921 (Colo. 1986) (citation omitted); see Colo. Rev. Stat. § 2-4-101.

# 1. Motion for Judgment as a Matter of Law—Unreasonable Delay or Denial Claim

\*10 [25] At the close of evidence, Owners moved, under Federal Rule of Civil Procedure 50(a), for judgment as a matter of law on Mr. Etherton's statutory claim against Owners for unreasonable delay or denial of benefits. Owners argued the evidence showed it had acted reasonably as a matter of law, which foreclosed any basis for Mr. Etherton's claim. The district court denied the motion, concluding Mr. Etherton presented sufficient evidence to submit the claim to the jury.<sup>5</sup> We affirm.

5

To seek appellate review of an argument raised in a Rule 50(a) motion, a party must reassert its argument under Rule 50(b) after trial. Cavanaugh v. Woods Cross City, 718 F.3d 1244, 1250 n. 1 (10th Cir. 2013). Although Owners argued only the Dr. Ramos issue in its Rule 50(b) motion, Mr. Etherton does not contest whether we can review Owners' Rule 50(a) argument on appeal.

## a. Standard of Review

[26] [27] [28] We review de novo a district court's decision to grant or deny a motion for judgment as a matter of law, applying the same legal standards as the district court. Hardeman v. City of Albuquerque, 377 F.3d 1106, 1112–13 (10th Cir. 2004). “Judgment as a matter of law is appropriate only if the evidence points but one way and is susceptible to no reasonable inferences which may support the nonmoving party's position.” Elm Ridge Expl. Co. v. Engle, 721 F.3d 1199, 1216 (10th Cir. 2013). “We draw all inferences from the evidence in favor of the non-moving party, and do not weigh the evidence or judge witness credibility.” Henry v. Storey, 658 F.3d 1235, 1238 (10th Cir. 2011).

## b. Legal Background

Mr. Etherton asserted a claim for the unreasonable delay or denial of his claim for benefits under Colo. Rev. Stat. §§ 10-3-1115 and -1116.

Colo. Rev. Stat. § 10-3-1115(1)(a) provides,

A person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits owed to or on behalf of any first-party claimant.

Colo. Rev. Stat. § 10-3-1116(1) states,

A first-party claimant ... whose claim for payment of benefits has been unreasonably delayed or denied may bring an action in a

district court to recover reasonable attorney fees and court costs and two times the covered benefit.

A few other provisions are pertinent to our discussion. “First-party claimant” is defined in Colo. Rev. Stat. § 10-3-1115(b)(I) as “an individual ... asserting an entitlement to benefits owed directly to ... an insured under an insurance policy.” Mr. Etherton is a first-party claimant under the statute.

Colo. Rev. Stat. § 10-3-1115(2) explains “an insurer’s delay or denial was unreasonable if the insurer delayed or denied authorizing payment of a covered benefit without a reasonable basis for that action.”

Colo. Rev. Stat. § 10-3-1113(4) addresses what constitutes reasonable conduct by an insurer:

In determining whether an insurer’s delay or denial was reasonable, the jury may be instructed that willful conduct of the kind set forth in section 10-3-1104(1)(h)(I) to (1)(h)(XIV) is prohibited and may be considered if the delay or denial and the claimed injury, damage, or loss was caused by or contributed to by such prohibited conduct.

Colo. Rev. Stat. § 10-3-1104(1)(h) proscribes a variety of unfair claim settlement practices. For example, insurers may not refuse claims without conducting a reasonable investigation, *id.* § 10-3-1104(h)(IV), or fail to promptly provide a reasonable explanation for a denied claim or a settlement offer, *id.* § 10-3-1104(h)(XIV).

### *c. Analysis*

\*11 Owners argues (i) the insurance agreement provides that the “amount of damages Etherton is legally entitled to recover is to be determined by agreement,” and further argues it did not violate § 10-3-1115(1)(a) because “no agreement had been reached as to benefits ‘owed’ ” when Mr. Etherton filed suit. *Id.* at 44–45. Owners also contends (ii) it did not unreasonably delay or deny Mr. Etherton’s claim because his claim was fairly debatable and Owners’ actions were objectively reasonable. These arguments fail.

#### i. Mr. Etherton’s Insurance Agreement Does Not Preclude an Unreasonable Delay or Denial Claim

[29]Mr. Etherton’s insurance agreement states: “Whether an injured person is legally entitled to recover damages and the amount of such damages shall be determined by an agreement between the injured person and us.” App. Vol. XIII at 3107 (emphasis omitted). This provision concerns whether and how much Mr. Etherton is entitled to damages for injuries caused by the uninsured motorist.

Owners argues it cannot be liable for unreasonably delaying or denying Mr. Etherton’s claim for benefits because this contract provision requires that it first agree to what it owes, and it never did. This understanding would immunize insurers from liability for unreasonable delay or denial of a claim for benefits so long as the insurer disagrees with how much is owed. In addition to being an unreasonable

interpretation of the contract, this reading conflicts with Colo. Rev. Stat. § 10-3-1115(1)(a), which states: “A person engaged in the business of insurance shall not unreasonably delay or deny payment of a claim for benefits owed to or on behalf of any first-party claimant.” The statute does not require that the insurer agree to a certain amount of damages before an unreasonable delay and denial can occur.

Under Owners' reading, the narrow contract provision would override the more broadly worded statute. The provision would therefore be void under Colorado law. *See, e.g., Aetna Cas. & Sur. Co. v. McMichael*, 906 P.2d 92, 101 (Colo. 1995) (en banc) (“Insurance policy clauses that are contrary to a provision of a statute are void as against public policy.”); *Radil v. Nat'l Union Fire Ins. Co.*, 207 P.3d 849, 852 (Colo. App. 2008) (same). We further spell out here why the plain meaning of the statute conflicts with Owners' reading of its contract with Mr. Etherton.

[30] First, Owners' reading would mean the statute could prohibit only unreasonable delays or denials of payments an insurer has already agreed it owes. But if an insurer unreasonably denies a payment owed under the insurance agreement, the insured can already seek redress through a breach of contract claim (which Mr. Etherton did). It would make little sense to interpret § 10-3-1115 as creating a new cause of action for harms already addressed elsewhere in Colorado law. The statute proscribes an insurer's unreasonable handling of an insured's claim for benefits, not simply the unreasonable delay or denial of payments the insurer has determined are owed.

Second, the word “deny” includes the insurer's decision not to approve a claim for benefits, not simply a refusal to pay benefits that are indisputably owed. The statute is not confined to claims where the payment is due and owing. It proscribes unreasonable denials, and if an insurer denies a claim for benefits, the payment is not due and owing.

[31] Third, the surrounding subsections indicate the statute applies to claims for disputed benefits, not simply those where the amount is due and owing. Section 10-3-1115(2) states “an insurer's delay or denial was unreasonable if the insurer delayed or denied *authorizing payment of a covered benefit* without reasonable basis for that action.” Colo. Rev. Stat. § 10-3-1115(2) (emphasis added). If subsection (1)(a) were understood to apply only when a payment of benefits is due and owing, the language in subsection (2) would be superfluous. Similarly, § 10-3-1116 provides, “A first-party claimant ... whose *claim for payment of benefits* has been unreasonably delayed or denied may bring an action in a district court....” *Id.* § 10-3-1116 (emphasis added). This section creates a right of action for the conduct described in § 10-3-1115, and describes the action as arising from the unreasonable delay or denial of claims, not simply payments due and owing.

\*12 Fourth, the Colorado Court of Appeals has construed the statute, consistent with our interpretation, to require for liability “only that a first-party *claim be denied* without a reasonable basis.” *Vaccaro v. Am. Family Ins. Grp.*, 275 P.3d 750, 756 (Colo. App. 2012) (emphasis added). In *Vaccaro*, the court upheld a jury verdict under Colo. Rev. Stat. §§ 10-3-1115 and -1116 where a payment was not due and

owing. *Id.* at 753–54, 760.

In sum, Owners' interpretation of the contract provision is unreasonable and would be void as against public policy as stated in Colo. Rev. Stat. § 10-3-1115.

## ii. Unreasonable Delay

[32] Owners asserts Mr. Etherton's claim under § 10-3-1115 fails as a matter of law because (1) Owners had a reasonable basis to dispute whether the collision caused Mr. Etherton's injuries, and (2) Owners' expert evidence demonstrated its conduct was objectively reasonable because it complied with industry standards.

### 1) Reasonable basis to dispute

[33] According to the Colorado Court of Appeals, an insurer's delay or denial of benefits is not necessarily reasonable under Colo. Rev. Stat. §§ 10-3-1115 simply because the claim for benefits was fairly debatable. Hansen v. Am. Fam. Mut. Ins. Co., — P.3d —, —, 2013 WL 6673066, at \*6–7 (Colo. App. Dec. 19, 2013), *rev'd on other grounds*, — P.3d —, 2016 WL 3398507. “[I]f a reasonable person would find that the insurer's justification for denying or delaying payment of a claim was ‘fairly debatable,’ this weighs against a finding that the insurer acted unreasonably. Nevertheless, fair debatability is not a threshold inquiry that is outcome determinative as a matter of law.” Vaccaro, 275 P.3d at 759–60 (quotations and citations omitted). Under this authority, an insurer

could unreasonably delay or deny a claim for benefits even if that claim is fairly debatable. *See Fisher v. State Farm Mut. Auto. Ins. Co.*, No. 13CA2361, — P.3d —, —, —, 2015 WL 2198515, at \*4–5 (Colo. App. May 7, 2015) (“[W]e disagree with [Defendant] that, under section 10-3[-]1115, an insurer's decision to delay or deny payment of a ‘fairly debatable’ UIM claim cannot be unreasonable as a matter of law.”); Hansen, — P.3d at —, —, 2013 WL 6673066, at \*6–7; Vaccaro, 275 P.3d at 759.

We agree with the foregoing authority and conclude that, under Colorado law, fair debatability can be a relevant but not necessarily a determinative factor as to whether the insurer acted reasonably.<sup>6</sup> We also agree with the district court that Mr. Etherton had presented sufficient evidence that Owners unreasonably delayed his claim, thereby precluding judgment as a matter of law on his unreasonable delay or denial claim. For example, Mr. Etherton's evidence showed that after months of communication, Owners sent a letter on January 2010 to Mr. Etherton's counsel expressing concerns about causation because of Mr. Etherton's “preexisting shoulder condition and the fact that he went without treatment for any back complaints for several months.” App. Vol. XII at 2982. But this conflicted with documentation Mr. Etherton provided months earlier showing he sought treatment for back pain two weeks after the accident. [App. Vol. XII at 2988 (attorney letter from July 2009 to Owners summarizing documentation sent); App. Vol. XIII at 3157 (notes from January 3, 2008—two weeks after the accident—describing results from Longmont Clinic's x-ray of Mr. Etherton's spine).]

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As explained above, the Colorado Supreme Court granted certiorari in *Hansen* to decide this question but ended up resolving the case on grounds that did not require reaching the issue. --- P.3d at ---, 2016 WL 3398507, at \*7.

## 2) Compliance with industry standards

\*13 [34]Owners alternatively argues the claim should not have been submitted to the jury because Owners complied with industry standards and therefore acted reasonably, especially in light of its compliance with Colorado's insurance claim regulations. This argument fails because Mr. Etherton presented sufficient evidence for the jury to find Owners did not comply with industry standards and therefore acted unreasonably.

[35]"The reasonableness of an insurer's conduct is determined objectively, based on proof of industry standards." *Fisher*, --- P.3d at ---, 2015 WL 2198515, at \*9. At trial, Mr. Etherton's expert witness, Richard Kaudy, testified that objective industry standards "come from many sources, including the legislature, the Unfair Claims Settlement Practices Act, manuals from carriers, ... [and] decisions by Colorado courts." App. Vol. VIII at 2066.

Colorado's Unfair Claims Settlement Practices Act is codified at Colo. Rev. Stat. §§ 10-3-1101 to -1116. Under the Act, "[i]n determining whether an insurer's delay or denial was reasonable, the jury may be instructed that willful conduct of the kind set forth in section 10-3-1104(1)(h)(I) to (1)(h)(XIV) is prohibited...." Colo. Rev. Stat. § 10-3-1113(4). The latter provision prohibits "[f]ailing to promptly provide a reasonable explanation of the basis in the insurance policy in relation to the facts or applicable law for denial of a claim or for the offer of a compromise settlement." *Id.* § 10-3-1104(1)(h)(XIV). Mr. Kaudy testified that Owners failed to provide a reasonable explanation for its \$150,000 offer. He also testified Owners denied Mr. Etherton's claim

before investigating it, in violation of § 10-3-1104(1)(h)(IV), which prohibits "[r]efusing to pay claims without conducting a reasonable investigation based upon all available information."

[36]Owners countered with its expert witness, Garth Allen, who testified that Owners satisfied industry standards by explaining in the offer notification letter that the \$150,000 offer was "based on the supporting documentation that [Mr. Etherton] provided." App. Vol. X at 2601. Mr. Allen's testimony provided a competing view, but we cannot as an appellate court weigh evidence or judge the credibility of witnesses. Viewing the evidence in a light most favorable to Mr. Etherton, *see Henry*, 658 F.3d at 1238, the jury could reasonably have found in Mr. Etherton's favor based on Mr. Kaudy's testimony. As such, the district court did not err in denying Owners' motion for judgment as a matter of law.<sup>7</sup>

7

Owners contends it complied with Colorado's regulation governing the "circumstances under which penalties will be imposed for failure to make timely decisions and/or payment on first party claims." 3 Colo. Code Regs. 702-5:5-1-14 § 2. The regulations require insurers to "make a decision on claims and/or pay benefits ... within sixty (60) days after receipt of [the claim] ... unless there is a reasonable dispute between the parties concerning such claim." *Id.* § 4(A)(1). Even if we accept Owners' argument that it complied because it had concerns about causation, it is not entitled to judgment as a matter of law. The regulations only provide minimum standards to avoid penalties. Although an insurer may act unreasonably if it violates the regulation, it does not follow an insurer acts reasonably if it meets the regulation's minimum standards.

The district court correctly denied Owners' motion for judgment as a matter of law. Colo. Rev. Stat. § 10-3-1115 applies to first-party claims for benefits, including those where the amount owed is not yet determined. And sufficient evidence was presented to allow a reasonable jury to find in Mr. Etherton's favor on his unreasonable delay or denial claim.

2. Mr. Etherton's Rule 59(e) Motion to Amend the Judgment

\*14 [37] The district court granted Mr. Etherton's motion to amend the judgment and increased his damages award from \$1,500,000 to \$2,250,000 based on its interpretation of Colo. Rev. Stat. § 10-3-1116. Owners unsuccessfully challenged this interpretation in opposition to the Rule 59(e) motion. We affirm.

a. *Standard of Review*

[38] [39] [40] [41] We review Rule 59(e) decisions for abuse of discretion. To reverse, we must have "a definite and firm conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." Headwaters Res., Inc. v. Ill. Union Ins. Co., 770 F.3d 885, 899 (10th Cir. 2014) (quotation omitted). "The abuse of discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions." ClearOne Commc'ns, Inc. v. Biamp Sys., 653 F.3d 1163, 1178 (10th Cir. 2011) (quotation omitted). "Pure questions of statutory interpretation are reviewed de novo." Stickley, 505 F.3d at 1076.

b. Colo. Rev. Stat. § 10-3-1116

Colo. Rev. Stat. § 10-3-1116 provides,

(1) A first-party claimant as defined in section 10-3-1115 whose claim for payment of benefits has been unreasonably delayed or denied may bring an action in a district court to recover reasonable attorney fees and court costs and two times the covered benefit.

....

(4) The action authorized in this section is in addition to, and does not limit or affect, other actions available by statute or common law, now or in the future. Damages awarded pursuant to this section shall not be recoverable in any other action or claim.

Colo. Rev. Stat. § 10-3-1116. Subsection (1) describes damages, fees, and costs awardable for actions under Colo. Rev. Stat. § 10-3-1115. Subsection (4) describes how the statutory right of action authorized in § 10-3-1115 relates to other actions or claims.

c. *Analysis*

It bears repeating that Mr. Etherton prevailed at trial on both his claim for breach of contract and his claim for unreasonable delay or denial, and that the court concluded the most he could recover on his breach of contract claim was \$750,000, the remainder of his policy limit. Owners argues § 10-3-1116 caps Mr. Etherton's damages at two times his covered benefit— $2 \times \$750,000 = \$1,500,000$ . It contends the statute prohibits a plaintiff from recovering damages for the covered benefit in a separate action (for example, a breach of contract claim) while also recovering two times the covered benefit under § 10-3-1116 for an unreasonable delay or denial claim. The district court disagreed, and so do we.

Mr. Etherton asserts §§ 10-3-1115 and -1116 create a statutory right of action to compensate for the unreasonable delay or denial of a claim for benefits, a claim that is distinct from the insured's underlying entitlement to benefits under the insurance contract. He argues the damages provision in § 10-3-1116 imposes a penalty that is calculated based on the amount of the covered benefit, and does not displace the insured's entitlement to the covered benefit in a separate action for breach of contract. He therefore concludes the district court's calculation was correct— $\$750,000 + 2 \times \$750,000 = \$2,250,000$ .

We agree with Mr. Etherton that Colo. Rev. Stat. § 10-3-1116 permits damages for a claim under § 10-3-1115—calculated as two times the covered benefit—in addition to recovery of the covered benefit through a breach of contract

claim. The statute's text and the Colorado Court of Appeals' interpretation of the statute support this conclusion.

\*15 Section 10-3-1116(1) does not displace the insured's potential entitlement to benefits for breach of contract under an insurance agreement. Instead, it allows an award of up to two times the covered benefit when an insurer is found liable for unreasonable delay or denial under § 10-3-1115. Section 10-3-1116(1) does not state this award includes the insured's payment for the covered benefit itself; it simply uses the covered benefit as a metric by which the penalty is calculated.

Section 10-3-1116(4) makes this distinction clear: "The action authorized in this section is in addition to, and does not limit or affect, other actions available by statute or common law, now or in the future. Damages awarded pursuant to this section shall not be recoverable in any other action or claim." Colo. Rev. Stat. § 10-3-1116(4). Sections 10-3-1115 and -1116 therefore describe a cause of action (unreasonable delay or denial of a claim) that is distinct from others, such as breach of contract. To adopt Owners' interpretation of § 10-3-1116(1) as precluding an additional award for the covered benefit in a separate breach of contract claim would "affect" another right of action because it would effectively abrogate the common law remedy of damages for breach of contract. Absent clear statutory language and intent from the Colorado legislature, we decline to adopt such an interpretation. *See Farmers Grp.*, 805 P.2d at 423 ("Although [Colorado law] expressly grants the General Assembly the right to abrogate common-law remedies, we will not lightly infer a legislative abrogation of that right absent a *clear* expression of intent." (quotations omitted)).

Owners asserts the district court's interpretation of § 10-3-1116 leads to the absurd result of permitting treble damages when the legislature limited damages in § 10-3-1116 to "two times

the covered benefit." But the court's interpretation did not treble the insured's damages. Section 10-3-1115 provides a cause of action distinct from a breach of contract action. Under a breach of contract claim, the insured may be entitled to recovery of the covered benefit. And under the § 10-3-1115 claim, the insured may be entitled to two times the covered benefit, as explained in § 10-3-1116. In total, the damages may equal three times the covered benefit, but not because the damages were trebled. The insured's recovery would be predicated on liability for two distinct causes of action—the insurer's breach of contract and its unreasonable delay or denial of a claim.

Owners also argues allowing recovery of the covered benefit in a separate action renders the second sentence in § 10-3-1116(4) meaningless. Subsection (4) states: "Damages awarded pursuant to this section shall not be recoverable in any other action or claim." Colo. Rev. Stat. § 10-3-1116(4). This provision clarifies that the double recovery allowed in § 10-3-1116(1) applies only to the unreasonable delay or denial claim under § 10-3-1115. Nothing in § 10-3-1115 or § 10-3-1116 provides for recovery of the covered benefit itself. Subsection (4) therefore does not preclude recovery for the covered benefit itself in a separate claim, such as breach of contract. In other words, the penalty provisions in § 10-3-1116 are available only if an insured succeeds on a § 10-3-1115 claim. If the insured simply asserts a breach of contract claim, he or she cannot recover the damages authorized by § 10-3-1115.

The Colorado Court of Appeals reached the same conclusion, holding that a claimant asserting an unreasonable delay or denial claim can "receive the covered benefit *and also*, receive two times the amount of the benefit." *Hansen*, — P.3d at —, 2013 WL 6673066, at \*10. It said "section 10-3-1116 explicitly contemplates and countenances that a plaintiff may simultaneously bring a breach of contract claim to recover certain benefits he was denied and a section 1116 claim for double those

benefits if they were unreasonably denied.” *Id.* at —, 2013 WL 6673066 at\*10 (quotations and alterations omitted).§

8

As explained above, the Colorado Supreme Court granted certiorari in *Hansen* to decide whether a § 10-3-1116 plaintiff can “recover two times the covered benefit in addition to the covered benefit itself.” *Hansen*, — P.3d at — n. 3, 2016 WL 3398508 at \*12 n. 3. We abated this appeal pending the Court’s decision in *Hansen*, which was announced on June 20, 2016. Because the Court held the insurer in *Hansen* reasonably denied coverage, it did not address plaintiffs’ ability to recover simultaneously for breach of contract and unreasonable delay or denial of benefits. *Id.* at —, 2013 WL 6673066 at \*7.

A separate Tenth Circuit panel recently construed § 10-3-1116, concluded “the damages awarded pursuant to section 10-3-1116 are not coextensive with the contract damages awarded under a common law breach of contract claim,” and affirmed an award in “the amount of the insurance benefit owed on the breach of contract claim and an additional two times that benefit under section 10-3-1116.” *Home Loan Inv. Co. v. St. Paul Mercury Ins. Co.*, — F.3d —, —, 2016 WL 3610054, at \*6 (10th Cir. July 5, 2016).

\*16 We conclude the district court correctly interpreted § 10-3-1116 as permitting damages for a § 10-3-1115 claim in the amount of two times Mr. Etherton’s covered benefit in addition to any damages available to him under his breach of contract claim. We also conclude the court did not abuse its discretion by granting Mr. Etherton’s motion to amend the judgment.

The district court’s order amending the judgment indicated the jury found, by a preponderance of the evidence, that Owners (1) breached its insurance contract with Mr. Etherton, and (2) unreasonably delayed or denied payment of Mr. Etherton’s insurance benefits. The jury further found Mr. Etherton’s damages for physical impairment or disfigurement were \$150,000, his noneconomic losses were \$375,000, and his economic losses were \$857,000. The district court explained these damages exceeded the remainder of Mr. Etherton’s policy limit, which was \$750,000. The court therefore entered judgment in the amount of \$2,250,000—\$750,000 for Mr. Etherton’s breach of contract claim, and \$1,500,000 for his unreasonable delay or denial claim.

We do not detect errors in the district court’s award or any abuse of discretion and therefore affirm.

#### IV. CONCLUSION

We affirm on all grounds. First, the district court properly applied Rule 702/ *Daubert* and did not abuse its discretion by finding Mr. Etherton’s expert’s methodology reliable and admitting his expert testimony. Second, the court correctly denied Owners’ motion for judgment as a matter of law because §§ 10-3-1115 and -1116 applied and because, when viewed in the light most favorable to the nonmoving party, Mr. Etherton presented evidence that would allow a reasonable jury to find in his favor even if we assume his claim for benefits was fairly debatable. Third, the district court correctly interpreted § 10-3-1116 and properly exercised its discretion to amend the judgment to increase Mr. Etherton’s damages award.

HARTZ, Circuit Judge, concurring, joined by GORSUCH, J.

I join.

I confess, however, some confusion about Colorado law. In particular, can an insurer be liable under Colo. Rev. Stat. § 10-3-1116 if it reasonably believes that it has provided no coverage for the injury? One might infer that the answer is no from language in the Colorado Supreme Court’s recent decision in *Am. Family Mut. Ins. Co. v. Hansen*, — P.3d —, 2016 WL 3398507 (June 20, 2016). After ruling that the insurance policy, on its face (but before reformation), did not provide coverage, the court wrote, “Hansen’s statutory claim must therefore fail, because American Family had a reasonable basis for denying coverage.” *Id.* at

\_\_\_\_\_, 2016 WL 3398507 at \*7. This conclusion makes sense, because it is reasonable to delay payment if it is reasonable to believe that no payment is due.

What complicates matters is that the state Court of Appeals had said in the same case that American Family could be liable under the statute even if its denial of coverage was a “fairly debatable” position. And the Supreme Court said, “Because we find that American Family had a reasonable basis for denying coverage based on the unambiguous language of the contract, we need not consider its alternative argument that its denial of coverage was, at the very least, a ‘fairly debatable’ position.” *Id.* This sentence leaves open the possibility that a “fairly debatable” position may not be a “reasonable” position and would leave an insurer open to potential statutory liability if its position was merely “fairly debatable.”

\*17 But a jury instruction in this case said, “A justification is ‘fairly debatable’ if reasonable minds could disagree as to the coverage-determining facts or law.” Aplt. App. at 776. It seems to me that a reasonable person could infer from the instruction that there is no difference between “fairly debatable” and “reasonable.” As a result, the jury may have found Owners liable under the statute even though it thought that Owners took a reasonable position in rejecting causation. But Owners does not pursue that point on appeal. Because I believe, although it is a close case, that the jury could have found Owners' position on causation unreasonable, I agree with affirmance.

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# The Admissibility of Expert Testimony

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[Editor's Note: While revising this chapter Professor Berger became ill and, tragically, passed away. We have published her last revision, with a few edits to respond to suggestions by reviewers.]

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# Reference Guide on Epidemiology

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# Reference Guide on Estimation of Economic Damages

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# A Systematic Approach to Clinical Determinations of Causation in Symptomatic Spinal Disk Injury Following Motor Vehicle Crash Trauma

Michael D. Freeman, PhD, MPH, DC, Christopher J. Centeno, MD, Sean S. Kohles, PhD

Clinical determinations of causation in cases of intervertebral disk (IVD) injury after a motor vehicle crash (MVC) are often disputed in medicolegal settings. No published systematic guidelines exist for making such determinations, which has resulted in infringement by nonclinical personnel into injury causation evaluations, a traditionally clinical activity. The result is causal determinations that are potentially disconnected from clinical observations of injury. The purpose of this review was to evaluate the current literature on causation, causal determinations after trauma and IVD injury after MVC, and to develop a practicable, logical, and literature-based approach to causation determinations of symptomatic IVD injury after MVC. The results of the review indicate IVD injury can result from any MVC regardless of magnitude, thus meeting the first criteria of causation, biologic plausibility. Individual determinations of causation depend entirely on the temporal association between the collision and the symptom onset (the second criterion) and a lack of a more probable explanation for the symptoms (the third). When these causal elements are met, clinicians can assert causation on a "more probable than not" or "reasonable probability" basis. Because of a lack of an established or reliable relationship between collision force and the probability of IVD injury the investigation of collision parameters is not a useful adjunct to causal determinations.

## INTRODUCTION

The origin of injury to the intervertebral disks (IVD) of the spine is a common source of dispute in medicolegal circumstances. Whereas treating clinicians typically make determinations of causal relationships between a trauma and an injury primarily based on the patient-related history of the traumatic event and the onset of symptoms, opposing experts frequently rely on population-based assumptions as a basis for disputing causal relationships. This scenario is observed most often when disk injuries and symptoms are attributed to motor vehicle crashes (MVC), because many crash-related injuries result from the negligence of another driver; thus, the nature and extent of an occupant's injuries may be contested. There is typically a strong third-party (insurer) interest in minimizing compensatory payments on behalf of the individuals who are at fault for the crash. As a result, an adversarial system has developed in the United States and many other industrialized nations, with the injured patient and his or her treating physicians on one side and the party responsible for the crash, his or her insurer, and the insurer's medical and scientific consultants on the other side [1,2]. Although some clinicians prefer to avoid causal determinations altogether, it can be argued that such determinations are part and parcel of regular medical care. To avoid such a determination solely because it may be later disputed by a party with interests opposing those of the patient is to avoid a duty to the patient; a duty that can have a significant impact on the patient's well-being. This is not to say that dissemblance and fraud do not exist in the patient population; however, when there is no evidence of dishonesty, there is no reason to assume the presence of fraud simply because a patient is claiming injury after a MVC that was caused by another's negligence (the most common setting for a legal claim for monetary damages). Such events are, for the most part, randomly distributed in the population that uses motor vehicles and not selective for people

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in whom fraudulent behavior is more common. When allegations of fraud are made in a medicolegal context, despite the absence of evidence of fraud, it is reasonable to question the motivation behind the assertion, because forensic consultants who provide partisan opinions are no more immune to secondary gain pressures than are litigants claiming injury [3].

There are some authors who maintain that for a determination of cause and effect to be made between a diagnosed injury and an MVC, a biomechanical analysis of the forces is necessary to determine whether or not a particular collision had the potential to cause the injuries [4] or that a detailed crash reconstruction is necessary before a causal association can be determined [5]. In contrast, most authors who have documented IVD injuries associated with an MVC make no mention of a biomechanical force analysis or a crash reconstruction [6,7]. The latter approach is most typical of the clinically pragmatic approach to causation. If it is known that an injury *can* be caused by a trauma, then there is no practical or logical purpose served in quantifying the degree of the trauma in order to assess the risk of injury *after* the event. Even injuries that are deemed highly unlikely or improbable are by definition still *slightly likely* or *possible*, and thus injury presence is typically evaluated after the fact clinically, and not called into question by a *post-hoc* suggestion of infrequency.

For the purposes of the present inquiry, a Medline search for the years 1980 through 2009 (as of July 2009) using the medical subject headings (MeSH) terms *intervertebral disk*, *intervertebral disk displacement*, and *disk, herniated* as well as the non-MeSH terms *cervical disk*, in conjunction with "injury" and/or "trauma," along with "cause," "causal," and "causation" in various combinations did not elicit any publications that addressed an organized approach to determinations of causation between disk injury and MVC exposure. It appears that, at the present time, there is no widely accepted scientific or clinical standard for such determinations.

The purpose of this article is to assess the evidence for the causal relationship between disk injury and MVC trauma based on the published literature on causal standards and the science of both disk injury and MVC trauma. Further, the authors propose a systematic and scientifically based approach to individual determinations of causation.

## PRIOR PUBLICATIONS ON CAUSATION

Determinations of causal association between a noxious exposure (microorganism, chemical, trauma, or other) and a disease or injury outcome in populations is an area of considerable interest to epidemiologists and others who study such issues. Individual clinical observations of cause and effect can serve as a reasonable basis for a case study and suggestion of a relationship. It is, however, difficult to draw generalizable conclusions from such reports. Case series provide stronger evidence of causation; however, without a control group of unexposed subjects, there is no way to determine which effects can be isolated to a particular exposure. Even when case-control studies, in which diseased or

injured subjects are compared with healthy subjects for level of exposure to a suspected noxious agent, show positive correlations between exposure and disease or injury outcome, the results cannot be interpreted as validated evidence of a causal relationship, as confounding factors may exist that can obscure true relationships. An example of confounding would be the relationship between coffee drinking and lung cancer. Coffee drinkers may have a higher rate of lung cancer than non-coffee drinkers, but only because smokers are more likely to drink coffee than nonsmokers, not because coffee is causally linked to lung cancer.

In an attempt to more clearly identify causal relationships between noxious exposures and outcomes in populations, Hill outlined a set of 9 criteria that needed to be considered to reasonably conclude that a particular noxious exposure could result in a particular disease [8]. Hill's criteria have served as a kind of seminal gold standard, in that they have been adopted and modified by many others, including the Food and Drug Administration, academic investigators, and pharmaceutical companies, as a means of approaching issues of causation systematically [9]. Based in part on Hill's work, Miller et al proposed a 4-stage process for identifying environmentally caused rheumatic disorders, an application that is more applicable to the goals of this article, because it allowed for assessments of causation in individuals rather than as a population-based construct [10]. McLean subsequently adapted Miller et al's work for causation in instances of fibromyalgia after MVC [11]. All causal criteria can be distilled to a minimum of 3 common and essential elements, which are as follows [12,13].

1. There must be a biologically plausible or possible link between the exposure and the outcome. For example, trauma and fracture are plausibly linked, but trauma and leukemia are not. Plausibility is a low threshold that is exceeded with relatively weak evidence, such as from small observational studies (case studies or case series with small numbers of subjects) or from the results of well-designed experiments with many subjects. Biologic plausibility only pertains to whether an outcome can possibly result from an exposure, and is unrelated to the rate or frequency of the outcome. Thus, evidence of low incidence is not evidence of biologic implausibility.
2. There must be a temporal relationship between the exposure and the outcome. The outcome cannot preexist the exposure; however, the outcome of interest may have preexisted the exposure in a less severe form that was worsened by the exposure. Such a determination requires an accurate documentation of the signs and symptoms of the condition of interest both before and after the exposure of interest. Additionally, the outcome cannot post-date the exposure by a period that is considered, from a clinical perspective, to be too long or too short to relate the two. This determination is highly dependent on the specifics of any case. For example, an injury to a nerve root may cause immediate pain, but electromyogram changes may lag behind by weeks or months. The deter-

mination of reasonable temporal association is typically made as a matter of clinical judgment, rather than from clearly delineated guidelines or principles.

3. There must not be a more likely or probable alternative explanation for the symptoms. The term "likely" is of greatest importance, as, for example, it is not sufficient to simply point out that a patient with back pain after trauma is obese, that obesity is related to back pain, and thus it is more likely that the obesity rather than the trauma caused the back pain. For an alternative etiologic explanation to be considered *more likely* than an alleged exposure it must be both biologically plausible *and* have a stronger temporal relationship to the onset of symptoms than the alleged exposure. If plausibility is present and temporality is relatively comparable, then 2 exposures can be compared by examining the dose-response (intensity) of each exposure. Such a comparison may involve an analysis of the forces of the exposure as well as an epidemiologic assessment of injury frequency associated with the forces, and is beyond the scope of a clinical assessment of causation.

## A Causation Algorithm for Disk Injury after MVC

In this section, the authors present a practical guideline for clinical determinations of causation in symptomatic disk injuries after an MVC, based on the application of the aforementioned 3 causal elements to the facts and findings in an individual case. The following definitions and assumptions are made. An IVD injury is defined by all of the following characteristics [14,15] (for this definition, "injury" is used only to define a disk that has become symptomatic after a discrete loading event of any magnitude, and the cause of the injury is not addressed).

1. It is symptomatic. This may include classic symptoms of segmentally appropriate radiculopathy, regional axial pain, or diskogenic referral of pain in a nondermatomal distribution.
2. There is clinical imaging evidence (magnetic resonance imaging [MRI], computed tomography, or diskography) that the symptomatic disk fits the generally accepted definition of a degenerative/traumatic disk [14]. This includes annular tears, herniations, and degeneration. Although there are findings specific to disk trauma, such as vertebral endplate fracture and edema presence in the marrow adjacent to the endplate, many traumatically initiated disk injuries are indistinguishable from degenerative changes in the disk [16]. Because of mediocre sensitivity and specificity (ie, true- and false-positive rates), imaging findings alone are insufficient evidence for either a causal or noncausal determination in a case of suspected or disputed traumatic disk injury [17,18].

MVC trauma is defined as follows.

1. The patient was an occupant of a motor vehicle at the time of a collision or event.

2. The collision or event transmitted a force through the patient's spine over a very short time, typically 70-120 ms [19]. Note that the magnitude of the force is not addressed in the definition, because any degree of forceful loading could potentially produce a symptomatic disk injury in a sufficiently susceptible individual.

There are 2 most likely scenarios in which a forcefully loaded IVD may become symptomatic.

1. A healthy disk with little or no changes associated with degeneration is subjected to a significant load resulting in disruption of the annulus and possibly instantaneous migration of nuclear material posteriorly toward the disk periphery and into the epidural space or the lateral recesses. This is the scenario most likely to produce injury to tissue surrounding the disk, including vertebral endplate fracture and ligamentous disruption, and is most likely to be associated with higher energy crashes with significant vehicle damage [20].
2. A degenerated disk (defined as a disk in which one or more of the following are present to some degree: desiccation, fibrosis, narrowing of the disk space, diffuse bulging of the annulus beyond the disk space, annular tears, endplate sclerosis, and osteophytes at the vertebral apophyses [14]) is loaded in a manner that initiates a symptomatic response. A significant proportion of the asymptomatic population has some degree of disk degeneration as seen on MRI; Matsumoto et al have performed the largest study to date on the topic, with MRI scans of the cervical spines of 497 asymptomatic subjects [21]. These authors describe a progressive direct relationship between the presence and severity of degenerative changes and age, with the disk degeneration noted in a range of 17% men and 12% of women in their 20s to 86% and 89% of men and women older than 60 years. Other authors have described similar findings with broad ranges of values depending on the age of the subjects; from virtually no disk degeneration in subjects <30 years of age, to 14% in those 30-40, and 62% in subjects >40 years of age [22,23]. Similar observations have been published with regard to lumbar spine degeneration among asymptomatic patients. Jensen et al described a cohort of 98 subjects who underwent lumbar MRI, noting that only 36% of subjects had no abnormal disks. Fifty-two percent of the scans were interpreted as having a bulge at a minimum of one level, 38% had abnormality at more than one level, 27% had a protrusion, and 1% had an extrusion [24]. These findings are consistent with those reported by other authors [25].

## Causal Elements

**Biologic Plausibility.** Can an MVC of any severity cause a disk injury? Crash testing of intact cadavers at accelerations recorded for no-damage rear-impact collisions has demonstrated IVD injury that cannot be detected by conventional

imaging such as CT and MRI [26]. Although the biomechanical literature on experimental loading of disks in cadaveric sled testing has demonstrated disk injuries even in relatively low accelerations (3.3 and 4.5 times the force of gravity or "g" [26]), such *ex vivo* testing of healthy disks does little to demonstrate minimal thresholds for injury in live human populations exposed to real-world crashes. No cadaveric testing can duplicate the significant variation in the manner in which loads are transmitted to the human spine in a MVC, given the variation in occupant position, restraint systems, vehicle interiors, and muscle loads. Additionally, the potential for variation in the condition of an individual IVD, including the ability of the disk to resist forceful loading from an external source, is too large to ever define in an experimental setting.

A relevant literature search revealed a complete absence of any publications suggesting that symptomatic IVD derangement *cannot* result from MVC exposure of any magnitude. To the contrary, injury to the disks of the cervical and lumbar spine has been documented in the relatively low level accelerations associated with little to no-damage collisions, roller coaster rides, and even sneezing [27-30]. It is reasonable to conclude, as a general precept, that the forceful loading of the spine that can occur in any MVC is a biologically plausible (possible) cause of symptomatic disk injury.

**Temporal Association.** Temporality is the strongest evidence of causation in evaluating the patient with post-MVC disk injury. It must be first established that the MVC preceded the onset of symptoms attributed to the disk injury. The exception to this rule is when a previously symptomatic disk is exacerbated by an MVC to the point that the course of care is significantly altered (ie, a previously diagnosed non-surgical disk condition becomes surgical directly after an MVC). In such cases, the determination must be made clinically as to whether the disk symptoms were likely to have worsened to the point that the surgical intervention was inevitable absent the MVC. The mere fact that the disk was previously symptomatic is not sufficient to draw the conclusion that it would have required surgery, given the good outcomes for patients with diskogenic symptoms who use a variety of surgical and nonsurgical treatments [31-33]. The symptom onset must be in reasonable proximity to the time of the MVC; however, disk injury symptoms may initially present as identical to symptoms of spinal strain or sprain, and it may be weeks or months before an MRI is performed and the disk injury diagnosis is first seen [34]. Additionally, disk injury symptoms may be progressive, as an injury to the annulus may progressively allow nuclear migration toward neurologic structures over a period of time while the patient is in weight bearing and active. Determinations as to whether delayed symptoms fulfill the temporal association criteria must be made by clinicians on a case-by-case basis.

An obvious weakness of the temporality criterion is that it can only be established from the history given by the patient, and patient histories can be erroneous or falsified. The former is unlikely in the case of injury, however, because one of the

hallmarks of injury is that there is a close temporal relationship between cause and effect (this lack of clear temporal proximity in repetitive traumatic exposures is the reason that injuries such as carpal tunnel syndrome are classified as diseases) [35]. This close temporal relationship means that it is unlikely that a patient will misattribute symptoms to a traumatic cause. As a practical matter, the most reliable indicator of when a patient began to have symptoms after a trauma is the patient. This is not to say that patients do not get details concerning an injury event wrong; patient perception or recollection of vehicle speeds, crash sequence, and other details of a collision may be inconsistent with the facts of a case for reasons other than untruthfulness. For example, an occupant who is injured in a minimal damage rear end collision may believe that the impact must have been at high speed despite a lack of physical evidence that this was the case.

With regard to the truthfulness of the patient, it is not the role of the clinician to investigate the veracity of the history given by the patient. Absent some ancillary indication of deception, clinicians are generally safe to believe their patients. The rate of fraud of any kind in auto insurance claims for treatment benefits (personal injury protection coverage) was estimated to be 6% for 2007 [36]. Even if every instance of fraud in auto insurance cases consisted of a patient giving a false history, clinicians would still be justified in believing their patients 94% of the time.

Intuitively, it makes sense that the closer the onset of symptoms is to the time of the collision the stronger the causal relationship between the MVC and the disk injury, and the strength of this relationship can be quantified using an indirect approach. For example, in a case of a 40-year-old male with neck pain and cervical radiculopathy that arose within 12 hours of a rear impact collision (later attributed to MRI findings of disk herniation), assuming no intervening trauma, it can be postulated, as a tautology, that either the crash caused the disk injury or that it was coincidental to the collision, regardless of cause. Thus, the probability that the crash caused the disk injuries [ $P(\text{disk}_{\text{MVC}})$ ] plus the probability the disk symptoms are coincidental to the crash [ $P(\text{disk}_{\text{COINC}})$ ] when added together account for all of the possible causes (100% or 1) of the disk injury and associated symptoms. If [ $P(\text{disk}_{\text{MVC}}) + P(\text{disk}_{\text{COINC}}) = 1$ ] then rearranging the terms gives [ $1 - P(\text{disk}_{\text{COINC}}) = P(\text{disk}_{\text{MVC}})$ ], meaning that if the probability that a disk injury occurred coincidentally on the same day of the MVC can be determined then the probability the MVC caused the disk injury can also be determined indirectly.

The probability of 2 unrelated events occurring in close temporal proximity can be calculated by multiplying the probability or odds of one times the other (odds are the ratio of 2 probabilities). For example, the odds of rolling 2 sixes in a row with a fair die are [ $(1:6) \times (1:6) = 1:36$ ]. This is because there are 36 possible combinations for any 2 rolls, including 1 and 1, 1 and 2, 1 and 3, etc, and only one of the combinations is a 6 and 6.

In a similar fashion the odds of a disk injury occurring coincidentally on the day of a collision can be calculated for the example given earlier. The annualized odds of involvement in a MVC for a 40-year-old male are 1:14 (once every 14 years), and the daily odds of crash involvement are approximately 1:5100 (one crash every 5100 days) [37]. The odds of the spontaneous development of disk symptoms are a bit more difficult to estimate. For example, it can be said that the patient had a single-day episode of neck and arm pain 12 months before the MVC, with no intervening episodes until the time of the collision. Thus, the odds that the symptoms would recur on any single day were no greater than 1:365. Multiplied together these 2 odds yield an odds of a disk injury occurring coincidentally on the day of the collision of 1:1,861,500. Conversely, the odds in favor of a causal relationship between the collision and the disk injury, given the onset of symptoms on the day of the collision, are 1,861,500:1.

### Lack of Likely Alternative Explanations

Alternative explanations for a disk injury include an intervening trauma that followed the MVC and preceded the symptoms indicative of disk injury. Another alternative explanation is the insidious onset of symptoms, possibly associated with a trivial perturbation such as sneezing. Although minor forces are possible causes of disk injury, they cannot be preferentially selected over the substantially greater forces of a collision when the two have occurred in close temporal proximity. If, for example, a patient sustains what is diagnosed as a lumbar strain in a collision and a week later sneezes and has a sudden onset of radicular pain associated with a disk extrusion, then it is most likely that the disk was injured in the MVC and the sneeze only prompted a progression of symptoms. It is not reasonable to point to minor forces associated with daily activities as a likely cause of a symptomatic disk in preference to the significantly greater trauma associated even with minimal and no-damage MVCs that is temporally relevant to the symptoms, particularly when the patient performed such minor activities with no difficulty prior to the MVC. A "likely" alternative explanation is one that is most probably causal and the best explanation to fit all of the facts at hand, not one that is only a *possible* cause with no historical or temporal evidence to link it to the symptomatic disk injury.

### DISCUSSION

Individual determinations of causation for IVD injury after MVC by clinicians require only that temporal association and lack of likely alternative explanation be satisfactorily present. The biologic plausibility or possibility that symptomatic disk derangement can follow any degree of forceful loading of the spine is satisfactorily present and need not be revisited in individual cases. Thus, the concept of measuring crash forces in detail as a means of determining disk injury potential can

be abandoned as serving no useful purpose in causation determinations.

There is no reliable index of the degree of force required to cause a particular degree of disk derangement. Walz and Muser theorized that unless a crash reconstruction and biomechanical loading assessment was performed for a particular crash and occupant that causation could not be determined, or, put another way, it must be determined that a given crash was sufficiently forceful to cause diagnosed injuries [4]. These authors suggested that parameters such as seat belt use, head restraint and seat properties, age, body size, and preexisting damage (sic) to the spine, *inter alia*, be taken into account when making causation determinations, effectively taking causal determinations out of the hands of clinicians. What these authors do not explain is how an evaluation of any or all of such factors could help determine whether or not any type or severity of injury is possible after a crash. Even if it could be determined that the risk of disk injury was exceedingly low for a particular occupant in a particular crash, this would not be evidence that contradicts any of the 3 elements of causation. Thus, this biomechanical risk model of injury presence has no utility for real-world determinations of causation.

After a determination of causation has been reached, the legal standard for expressing the opinion is as "more probable or likely than not" or as a "reasonable probability" or "reasonable medical probability" [38]. In some jurisdictions, the standard is that the clinician must be "more than 50% certain" that the opinion is correct. The purpose of such language is to describe the results of an internal process of weighing evidence, and to arrive at a conclusion that the clinician is more certain than not that his or her opinion is accurate or true. The methodology presented in this article is designed to provide a framework for clinicians to arrive at opinions of causation that can be expressed in terms of what is more likely than not. Thus, when using these guidelines in a narrative report setting, the clinician can write that the essential causal elements of biologic plausibility, temporality, and lack of likely alternative explanation have been met for a given case (if true), and that a particular symptomatic disk injury resulted from a particular motor vehicle crash, as a reasonable medical probability.

It must be noted that the model of causation presented herein suffers from the fact that there is no other alternative against which it can be evaluated for accuracy. Clinicians receive little or no formal education in medical school or residency regarding a systematic approach to causation. Thus, the authors recommend that guidelines presented herein be evaluated, modified if necessary, and considered for adoption by consensus by appropriate scientific and medical organizations.

### CONCLUSIONS

Individual determinations of causation for disk injury after MVC are most appropriately conducted by clinicians, based primarily on an evaluation of the temporal association be-

tween the MVC and the symptom onset. The lack of a valid or meaningful collision force threshold below which it can be said that a disk injury will not occur means that investigation of collision parameters for the purposes of injury causation assessment is a pointless endeavor.

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UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
ORLANDO DIVISION

WILLIAM SCOTT CARMODY,

Plaintiff,

v.

Case No. 6:14-cv-830-Orl-37KRS

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant.

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ORDER

This cause is before the Court on the following:

- (1) *Daubert* Motion to Limit Expert Testimony of Robert Masson, M.D. (Doc. 76), filed May 15, 2015; and
- (2) Plaintiff's Opposition and Response to Defendant's *Daubert* Motion (Doc. 78), filed May 29, 2015.

BACKGROUND

Plaintiff William Scott Carmody is Defendant State Farm Mutual Automobile Insurance Company's insured under Automobile Insurance Policy 028708159E ("**Policy**"), which includes coverage for uninsured motorist insurance benefits ("**UM Benefits**"). (See Doc. 2, ¶ 6; Doc. 1-1, p. 13; see also Doc. 7, ¶¶ 6, 11-12.) On **September 22, 2011**, Jennifer R. Vause ("**UM Motorist**") negligently "rear-ended" the vehicle occupied by Plaintiff ("**2011 Accident**"). Contending that the 2011 Accident caused him permanent injuries, and the UM Motorist would likely be unable "to fully compensate" Plaintiff for his losses, Plaintiff demanded UM Benefits under the Policy. (See Doc. 2, ¶¶ 2-4, 7-8.) Defendant failed to pay Plaintiff UM Benefits as requested,

which Plaintiff claims is a breach of the Policy (see *id.* ¶¶ 9–10). Defendant admits that the Policy provides coverage for the Accident; however, it denies that Plaintiff sustained injuries or damages from the Accident sufficient to trigger an entitlement to UM Benefits. (See Doc. 7, ¶¶ 6, 8–9, 11–12.)

On September 10, 2014, the Court entered its Case Management and Scheduling Order (“**CMSO**”) requiring—among other things—that Plaintiff and Defendant submit their Disclosure of Expert Reports by December 19, 2014, and January 20, 2015, respectively. (Doc. 18, p. 14.) Thereafter, contentious discovery ensued which required repeated Court intervention. (See Doc. 25, 28, 30, 33, 34, 37, 39, 47, 56, 62, 65, 73, 75.) Pertinent to the matters presently before the Court, the Court entered Orders sanctioning Plaintiff for his untimely and insufficient expert witness disclosures by precluding Plaintiff’s reliance on the testimony of certain medical professionals and also limiting the testimony of Plaintiff’s remaining “treating” physicians—Richard Smith, M.D. (“**Dr. Smith**”) and Robert Masson, M.D. (“**Dr. Masson**”)—to “opinions formed based on observations made during the course of [Plaintiff’s] treatment.” (See Doc. 62, p. 10; see also Doc. 75 (rejecting Plaintiff’s objections and adopting and affirming Order imposing sanctions).)

On March 20, 2015, Plaintiff disclosed that Dr. Masson “will testify that the [2011 Accident] caused the onset of [Plaintiff’s] symptoms and aggravation of a pre-existing lumbar condition” and “about how the [A]ccident-related injuries have impacted the life of Plaintiff.” (See Doc. 53, p. 4.) Further, Dr. Masson will “provide *expert testimony* that the injuries caused by [the Accident] to the Plaintiff are permanent, and require future medical care.” (*Id.* (emphasis added).) After deposing Dr. Masson, Defendant filed a motion requesting entry of an Order prohibiting Dr. Masson from offering expert

testimony as to the cause of Plaintiff's injuries. (See Doc. 76 ("**Daubert Motion**").) Plaintiff filed his response. (Doc. 78.) The action is set to be tried before a jury during the trial term commencing **November 2, 2015** (Doc. 18), and the *Daubert* Motion is now ripe for adjudication.<sup>1</sup>

### LEGAL STANDARDS

Before allowing a party to present the opinion testimony of an expert witness at a jury trial, courts must act as a "gatekeeper" by making a preliminary determination that the requirements of Federal Rule of Evidence 702 are satisfied. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 590 (1993); *see also* Fed. R. Evid. 104(a). Rule 702 provides that a witness with the requisite "knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise" if: (a) the witness possesses "scientific, technical, or other specialized knowledge" that "will help the trier of fact to understand the evidence or to determine a fact at issue; (b) "the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." These requirements help ensure that any expert testimony presented at a jury trial is relevant, reliable, and supported on "good grounds." *See Daubert*, 509 U.S. at 589–90. Further, under *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999), the court must ensure that expert witnesses present "in the courtroom the same level of intellectual rigor that characterizes the practice of the expert in the field."

The U.S. Court of Appeals for the Eleventh Circuit has identified three questions that the district court should consider before allowing expert testimony. *See City of*

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<sup>1</sup> The Court set the matter for a hearing (Doc. 80), but the Court cancelled the hearing based on the parties' representations that neither would present evidence at the hearing (Doc. 81).

*Tuscaloosa v. Harcros Chem., Inc.*, 158 F.3d 548, 562 (11th Cir. 1998). First—qualification—is the expert qualified to testify competently regarding the matters he intends to address? *Id.* Second—reliability—is the methodology by which the expert reaches his conclusions sufficiently reliable? *Id.* Third—helpfulness—does the testimony assist the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue? *Id.* The party presenting the expert witness must establish by a preponderance of the evidence that all three of these questions are answered in the affirmative. See *id.*; *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1335 (11th Cir. 2010).

The court's reliability assessment must focus "solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. Such focus is aided by consideration of a non-exhaustive list of factors, including any known or potential rate of error, whether the methodology is generally accepted in the expert's field, and whether it has been subjected to peer review, publication, or testing. See *id.* at 593–94. If the "methodology" is no more than the expert's own *ipse dixit*, then the court should not permit the opinion testimony. See *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) (directing courts to exclude expert witness testimony when there is "simply too great an analytical gap between the data and the opinion proffered").

## DISCUSSION

Dr. Masson is an experienced and decorated physician in the field of Neurosurgery, and Defendant does not challenge his qualifications. (See Doc. 76; see also Doc. 78, pp. 21–29.) Rather, Defendant challenges the reliability of Dr. Masson's opinion that Plaintiff's physical injuries and problems were caused by the 2011 Accident.

(See Doc. 76.) Defendant argues that these opinions are unreliable because: (1) Dr. Mason lacks “a proper foundation, *i.e.* sufficient facts and data” for his causation opinion; (2) Dr. Mason based his causation opinion solely on the patient history relayed by Plaintiff rather than a methodology founded on scientific methods or techniques; and (3) Dr. Mason failed to exclude other possible causes of Plaintiff’s injuries. (*Id.* at 3, 6, 8, 12.) Plaintiff counters that Dr. Masson’s causation opinions are sufficiently reliable because they are based on the “traditional medical concept of subjective, objective (physical exam), assessment and prognosis” (SOAP method).<sup>2</sup> (See Doc. 78, p. 13.)

Dr. Masson testified that he examined Plaintiff only one time—after this action was filed and almost four years after the 2011 Accident. (Doc. 76, p. 15.) Aside from an MRI study—done on a date unknown to Dr. Masson—he did not review Plaintiff’s prior medical reports or medical history, and he did not communicate with Plaintiff’s prior doctors or therapists before making his causation opinion. (See *id.* at 16–17.) Rather, Dr. Masson relied on the history provided to him by Plaintiff, which reflected a close temporal proximity between the 2011 Accident and onset of his injuries and omitted information about prior injuries Plaintiff sustained in train and automobile accidents before the 2011 Accident.<sup>3</sup> (*Id.* at 18–19, 24 (admitting that he did not know of or consider prior accidents).)

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<sup>2</sup> The Court is not persuaded by Plaintiff’s argument concerning SOAP. SOAP may be a generally accepted methodology for certain medical treatment purposes—such as forming a diagnosis or treatment plan—but it is not a generally accepted methodology for determining the *cause* of a medical problem. Further, Plaintiff has not shown that, when used to determine causation, SOAP has a known error rate, is subject to testing, or has been subject to peer review.

<sup>3</sup> Dr. Masson testified that the injuries he found during his physical examination of Plaintiff were “consistent with the story the patient gave [him].” (Doc. 76, p. 25.)

Courts frequently exclude causation opinion testimony from expert witnesses who—like Dr. Masson—base their opinions on a plaintiff's account of the facts without consideration of other possible causes of an injury. See *Kilpatrick v. Breg, Inc.*, 613 F.3d 1329, 1336 (11th Cir. 2010); *Hendrix ex rel. G.P. v. Enenflo Co., Inc.* 609 F.3d 1183, 1195 (11th Cir. 2010) (holding that the expert must not only rule out other possible causes to get to the final suspected cause, but also make sure the final cause is derived from a scientific methodology); *Cook ex rel. Estate of Tessier v. Sheriff of Monroe Cnty.*, 402 F.3d 1092, 1111 (11th Cir. 2005); see also *Cooper v. Marten Transport, Ltd*, 539 F. App'x 963 (11th Cir. 2013);<sup>4</sup> see *Bowers v. Norfolk S. Corp.*, 537F.Supp.2d 1343, 1366 (M.D. Ga. 2007) (rejecting causation opinion of physician which was based on an incomplete medical history). Based on this law, and a careful review of the record—particularly Dr. Masson's deposition—the Court finds that Plaintiff has not established by a preponderance of the evidence that Dr. Masson's subjective causation opinion is based on sufficient facts and data nor that it is the product of a reliable methodology.

### CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** that the *Daubert* Motion to Limit Expert Testimony of Robert Masson, M.D. (Doc. 76) is **GRANTED**.

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<sup>4</sup> The district court in *Cooper* precluded two physicians—Drs. Pollydore and Kelly—from offering expert opinions concerning the cause of a plaintiff's spinal injuries. *Cooper*, 539 F. App'x at 967. Drs. Pollydore and Kelly were the *Cooper* plaintiff's treating physician and surgeon, and the district court determined that their causation opinions were not reliable because they were based only on physical examinations of the *Cooper* plaintiff and a review of his medical history in relation to the subject accident. See *id.* at 966–67. The Eleventh Circuit agreed with the exclusion ruling because the methodology employed by Drs. Pollydore and Kelly amounted to “simple reliance on a temporal relationship” without considering and excluding alternative causes. *Id.* (rejecting plaintiff's characterization of his experts' methodology as properly founded on “basic physics principles and the effects of force on the spine”).

**DONE AND ORDERED** in Chambers in Orlando, Florida, on September 18,  
2015.



  
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ROY B. DALTON JR.  
United States District Judge

Copies:

Counsel of Record



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