UNPREDICTABLE AND INCONSISTENT: NEVADA'S EXPERT WITNESS STANDARD AFTER *HIGGS V. STATE*

*Ryan A. Henry**

I. INTRODUCTION

Early one morning, a 19-year-old woman sits peacefully in her sedan in a parking lot. Out of nowhere, a construction truck slams into her passenger side, lifting the car three feet off the ground, crushing part of the door, and exploding one tire. Paramedics treat the woman at the scene, but decide she does not need to see a physician. Soon after, back pain begins and within a few weeks, medical specialists diagnose a myriad of medical problems, including a hip contusion, a height decrease, and spinal injuries. Devastated by the mounting medical costs, the victim sues to recover damages for negligence against the construction company who owns the truck.

At trial, the injured woman's medical experts testify that the accident caused her back injuries. However, the trucking company presents its own expert testimony. Specifically, a biomechanical engineer testifies that the construction truck did not hit the victim's sedan with enough force to cause her injuries. The engineer makes this opinion based on a photograph of the sedan, despite having no actual knowledge of the crash's physics including the vehicles' starting points, speeds, or collision angles, or the distances between the vehicles before impact. After deliberation, the jury finds the construction company one hundred percent at fault for the accident, but only awards the injured woman enough money to cover her special damages. The award is inadequate to pay for future medical care or compensate for pain and suffering. During the appeal process, the plaintiff passes away and does not live to see justice.

Unfortunately, this situation is all too common.[1] A jurisdiction's expert witness standard can have an enormous impact and practical ramifications in criminal or civil trials within the federal or state context.[2] Every day, litigants use experts at trial to prove elements such as causation, to establish standards of

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* Juris Doctor Candidate, May 2012, William S. Boyd School of Law, University of Nevada, Las Vegas. Thank you to everyone for their hard work on this Note including Professor Sara Gordon, Tim Mott, Robert Opdyke, Kammi Rencher, Cayla Witty, and the rest of the *Nevada Law Journal* staff.

[1] *See* Hallmark v. Eldridge, 189 P.3d 646, 649–50 (Nev. 2008) (containing very similar facts and procedural history to narration).

[2] *See* Geoffrey White, *Admitting Scientific Evidence: Exploring the Ramifications of the Nevada Supreme Court's Rejection of the* Daubert *Doctrine*, NEV. LAW., May 1999, at 30, 32 (explaining the impact of an admissibility standard on various parties and causation issues).

care, to calculate damages, and to connect suspects to an accident's scene, among other important case functions.[3] The admittance of unfounded expert witness testimony, or the exclusion of legitimate expert testimony, can be devastating.[4] Admittance or exclusion of expert testimony can even change the outcome of a trial.[5] A proper expert witness standard finds a balance between consistency and flexibility, respecting that jurisdiction's rules of evidence while avoiding a "free for all" that admits junk science.[6]

This Note argues that Nevada's expert witness admissibility standard, as set out in *Higgs v. State*,[7] will result in unpredictable and inconsistent application. Part II discusses the historical development of expert testimony admittance standards by first outlining the federal standard from *Frye*[8] to the *Daubert* trilogy.[9] It then shifts focus to expert witness admissibility in state courts, specifically in Missouri and North Dakota, two states whose legislatures provided statutes to define admissibility standards distinct from the evolving case law. Next, it takes an in-depth look at the evolution of Nevada's modern admissibility standard, focusing on the foundational cases: *Yamaha*,[10] *Dow Chemical*,[11] *Banks*,[12] and *Hallmark*.[13] Part III outlines the Supreme Court of Nevada's holding and rationales in *Higgs*. Part IV focuses on the weaknesses and ramifications of Nevada's expert witness standard as defined in *Higgs*. It then proposes the Nevada Legislature amend NRS 50.275 with additional conditions that incorporate the Court's objectives as set out in *Higgs*. Finally, this Note concludes that the Supreme Court of Nevada must provide even further clarification and guidance to Nevada's lower courts and practitioners as to the application of the recently re-affirmed expert witness standard to allow for

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[3] Edward K. Cheng, *Independent Judicial Research in the* Daubert *Age*, 56 DUKE L.J. 1263, 1265 (2007).

[4] Jeffrey W. Stempel, *Expert Witnesses: The Nevada Supreme Court Clarifies Adherence to NRS 50.275 and Judicial Discretion, Expressly Declining to Embrace the Federal* Daubert *Approach*, NEV. LAW., Oct. 2010, at 10, 11 (discussing how "the successful evidentiary movant (usually a defendant) has often been able to prevail on summary judgment because of the claimant's inability to use expert testimony to establish a genuine factual dispute as to defectiveness, causation or some other necessary element of a claim").

[5] Cheng, *supra* note 3, at 1265.

[6] *See* Alma Kelley McLeod, Commentary, *Is* Frye *Dying or is* Daubert *Doomed? Determining the Standard of Admissibility of Scientific Evidence in Alabama Courts*, 51 ALA. L. REV. 883, 905 (2000) (examining Alabama's options in adopting the *Frye* standard, *Daubert*, or neither); *see also* Note, *Admitting Doubt: A New Standard for Scientific Evidence*, 123 HARV. L. REV. 2021, 2028 (2010) [hereinafter Note, *Admitting Doubt*] (explaining how "'*Daubert* is not supposed to be a methodological handbook for good science; it is supposed to set out a standard for good adjudication'" (quoting Brian Leiter, *The Epistemology of Admissibility: Why Even Good Philosophy of Science Would Not Make for Good Philosophy of Evidence*, BYU L. REV. 803, 817 (1997))).

[7] Higgs v. State, 222 P.3d 648 (Nev. 2010).

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

[9] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993); Gen. Elec. Co. v. Joiner, 522 U.S. 136 (1997); Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

[10] Yamaha Motor Co., U.S.A. v. Arnoult, 955 P.2d 661 (Nev. 1998).

[11] Dow Chem. Co. v. Mahlum, 970 P.2d 98 (Nev. 1998), *modified on other grounds by* GES, Inc. v. Corbitt, 21 P.3d 11 (Nev. 2001).

[12] Banks *ex rel.* Banks v. Sunrise Hosp., 102 P.3d 52 (Nev. 2004).

[13] Hallmark v. Eldridge, 189 P.3d 646 (Nev. 2008).

more predictability and consistency. Further, the Nevada Legislature should amend NRS 50.275[14] to provide a framework that incorporates the objectives set out in *Higgs*.

II. Historical Development of Expert Witness Standards

Until *Frye* was decided in 1923, the law made no specific distinctions between types of expert testimony in regards to admissibility.[15] For expert testimony to be admissible, evidence had to be relevant, difficult enough for the average juror to need the assistance of an expert, and neither overly prejudicial nor time consuming.[16] The doctrinal basis for evaluating expert testimony became more rigorous and courts felt the pressure for specialized rules of evidence.[17] The judiciary system realized that scientific evidence posed special problems, and courts felt pressure to create a more heightened scrutiny.[18]

A. Federal Admissibility Standards: "Gatekeepers" Replace "General Acceptance"

Following the Court of Appeals for the District of Columbia's decision in *Frye v. United States*, scientific expert testimony was only admissible if the scientific principle had gained "general acceptance" in its field.[19] For example, in *Frye*, the Court held the expert testimony regarding the results of a systolic blood pressure deception (polygraph) test to be inadmissible because the test had not gained general acceptance within the relevant scientific fields.[20]

For the next 70 years, standards varied among the circuits regarding the application of *Frye*,[21] with the majority of federal courts following the *Frye* test.[22] The Federal Rules of Evidence (FRE), passed in the 1970s, led to a re-evaluation of the continued relevance of *Frye* in federal courts.[23] In the 1990s, the rules changed as the United States Supreme Court addressed concerns about the admittance of "junk science," especially in complex cases.[24] Some examples of areas where there had been admission concerns were actions involving product liability including pharmaceuticals, pollution, and medical malpractice."[25]

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[14] Nev. Rev. Stat. § 50.275 (2009) (added in 1971 and taken from Draft Federal Rule 702).
[15] D.H. Kaye, *The Dynamics of* Daubert: *Methodology, Conclusions, and Fit in Statistical and Econometric Studies*, 87 Va. L. Rev. 1933, 1938 (2001).
[16] *Id.*
[17] *Id.* at 1943–44.
[18] *Id.* at 1944.
[19] Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (holding that scientific expert evidence must be somewhere in the "twilight zone" where the evidential principle is recognized).
[20] *Id.*
[21] Cassandra H. Welch, Note, *Flexible Standards, Deferential Review:* Daubert*'s Legacy of Confusion*, 29 Harv. J.L. & Pub. Pol'y 1085, 1086–87 (2006) (discussing the historical development of expert witness testimony as established in *Frye*).
[22] Stempel, *supra* note 4, at 10.
[23] *Id.*
[24] *Id.*
[25] *Id.* at 11.

In 1993, the United States Supreme Court changed the landscape of expert testimony admissibility by giving trial court judges a much larger role in evaluation of proposed expert testimony.[26] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the Court sought to align the admittance of scientific expert testimony in a federal trial with FRE 702, which superseded the predated *Frye*.[27] *Daubert* held that nothing in the drafting history of FRE 702 referred to the necessity of "general acceptance" for admissibility, and such a prerequisite would clash with the "liberal thrust" of the Federal Rules.[28] The Court addressed limits on the admissibility of scientific evidence, specifically stating that evidence must be both relevant and reliable.[29] The Court expressed its confidence in federal justices' abilities to undertake review and gave a non-comprehensive list of factors that judges may consider.[30] Cross-examination and proper instructions regarding the burden of proof remained the appropriate ways to address questionable, yet admissible, evidence.[31] The core of *Daubert* was that trial court judges "can — and must — decide whether proffered scientific testimony is based on the scientific method without taking a position regarding the truth of particular scientific conclusions."[32]

The *Daubert* decision advised judges to focus on principles and methodology, instead of conclusions, when deciding whether to admit expert testimony.[33] The premise was that conclusions, but not methods, are "inherently corrigible."[34] Because there are no certainties in science, "a body of established truths" cannot establish science.[35] The idea is that "the scientific method is itself scientifically uncontroversial," and when judges focus on this method, it allows them to avoid taking a side on scientific issues while still determining whether the expert testimony amounts to "scientific knowledge."[36] Still, judges have the daunting task of resolving disagreements among qualified scientists about whether a theory or technique is "scientific."[37] Judges must also reach their decision aside from personal bias or beliefs.[38]

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[26] Note, *Reliable Evaluation of Expert Testimony*, 116 HARV. L. REV. 2142, 2143 (2003) [hereinafter Note, *Reliable Evaluation*].

[27] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 587 (1993).

[28] *Id.* at 588.

[29] *Id.* at 589.

[30] Factors for consideration include whether the theory can be (and has been) tested, has been subjected to peer review, the known or potential rate of error, and if the theory has a widespread or general degree of acceptance. *Id.* at 593–94.

[31] *Id.* at 596. The *Daubert* decision has been the basis for countless commentary. *See, e.g.*, 1 DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY §1:7–40 (2010–2011).

[32] Adina Schwartz, *A "Dogma of Empiricism" Revisited:* Daubert v. Merrell Dow Pharmaceuticals, Inc. *and the Need to Resurrect the Philosophical Insight of* Frye v. United States, 10 HARV. J.L. & TECH. 149, 157 (1997).

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.* at 158.

[38] *Id.*

In his partial dissent, Chief Justice Rehnquist expressed concern that the majority's reach may have exceeded its grasp[39] in imposing increased gatekeeper responsibilities that may obligate judges to "become amateur scientists."[40] Rehnquist explained that determining whether scientific knowledge can and has been tested required an understanding of scientific knowledge and terms, which other judges, much like himself, may not truly possess.[41] Rehnquist also was apprehensive that judges would apply the listed factors strictly despite the majority's mandate for flexible application, which could result in possible confusion and misapplication.[42]

When the Supreme Court remanded to the Ninth Circuit, Judge Kozinski was equally skeptical about applying the newly defined standard, and the Court eventually held inadmissible the expert testimony that pills had caused the plaintiff's birth defects.[43] Kozinski stated that "*Daubert* puts federal judges in an uncomfortable position"[44] in requiring them to decide whether testimony is based on "good science" or is derived from a "scientific method."[45] The very expert whose testimony a judge would rule on likely has far superior scientific knowledge, making the judge's responsibility a daunting one.[46]

Commentators have noted that a thorough *Daubert* review is not "realistically implementable."[47] One study that surveyed four hundred state court judges found that the majority supported a "gatekeeping role" when it came to determining expert testimony admissibility.[48] The same study exposed data regarding how prepared judges are for that role of assessing the validity and reliability of scientific evidence.[49] Of the judges surveyed, 52 percent believed their education left them adequately prepared to deal with the range of scientific evidence proffered within their courtrooms.[50] While 63 percent of the judges had received some type of CLE training regarding the courtroom usage of certain kinds of scientific evidence, 96 percent had never received education about general scientific methods and principles.[51] When it came to peer review, 71 percent understood applying the scientific concept.[52] In contrast, only 6 per-

[39] Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 599 (1993) (Rehnquist, C.J., concurring in part and dissenting in part) (stating that there is no reference to "reliability" in FRE 702, yet the majority had concluded that "reliability" and "relevance" were the "touchstones" of expert witness admissibility).
[40] *Id.* at 600–01.
[41] *Id.* at 600.
[42] *Id.* at 598.
[43] Daubert v. Merrell Dow Pharm., Inc., 43 F.3d 1311, 1322 (9th Cir. 1995).
[44] *Id.* at 1315.
[45] *Id.* at 1316 (Kozinski expressed a greater concern in evaluating cutting-edge research "where fact meets theory and certainty dissolves into probability," yet a judge must resolve disagreements between highly qualified scientists when there may be no consensus on the matter at hand.).
[46] *Id.*
[47] Note, *Admitting Doubt*, *supra* note 6, at 2030.
[48] Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Survey of Judges on Judging Expert Evidence in a Post-*Daubert *World*, 25 LAW & HUM. BEHAV. 433, 443 (2001).
[49] *Id.* at 452.
[50] *Id.* at 442.
[51] *Id.*
[52] *Id.* at 447.

cent of judges surveyed truly understood the concept of falsifiability, and 4 percent clearly understood how to apply the concept of error rate.[53] Additionally, judges may underestimate the role their own biases play in admissibility decisions when placed in a position with such discretion to assess facts and resolve scientific discrepancies.[54]

Subsequent expert testimony cases further defined the federal standard. *General Electric Co. v. Joiner* established the abuse of discretion standard for review of decisions regarding the admissibility of scientific expert testimony.[55] Two years later, *Kumho Tire Co. v. Carmichael* extended the flexible *Daubert* standard to all expert testimony.[56] This meant a judge's general "gatekeeping" duties in federal court would apply to testimony based on "technical" or "specialized" knowledge as well as "scientific" knowledge.[57]

Many have criticized the *Daubert* trilogy for numerous reasons. First, the federal standard may raise legitimate concerns over fairness because the costly *Daubert* hearings favor the more affluent party.[58] Additionally, "science and law treat error types differently: law tends to be indifferent between false positive and false negatives, while many scientific studies seek to limit false positives, permitting more false negatives."[59] In other words, a false positive would include an erroneous finding of causation when none actually exists, and a false negative would include erroneous findings of no causation when one truly does exist.[60] These differences may create a bias against finding causality in tort cases.[61] Scholars have also argued that judges are more likely to admit expert witness testimony that is pro-prosecution than pro-defendant in criminal cases, creating a bias against criminal defendants.[62]

Other difficulties exist because of the differences between legal and scientific fact-finding. For example, legal fact-finding is concerned with using an expert's knowledge to help a jury find justice within the facts of a particular case.[63] In contrast, scientific fact-finding seeks universal truth that can be completely separated from the context producing the particular result.[64] Law and

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53 *Id.* at 444–47.
54 Note, *Admitting Doubt*, *supra* note 6, at 2031.
55 Gen. Elec. Co. v. Joiner, 522 U.S. 136, 143 (1997). A federal trial judge's "gatekeeping" discretion is evident in three separate matters. Note, *Reliable Evaluation*, *supra* note 26, at 2146. First, as far as reliability analysis, a trial judge has discretion to decide the issue on the briefs alone, witness voir dire, or by holding an evidentiary hearing. *Id.* Second, a trial judge's substantive discretion comes from the ability to decide which factors are pertinent in evaluating a particular expertise. *Id.* Last, a trial judge's most powerful discretion is in making the ultimate decision on admissibility. *Id.* A Circuit Court of Appeals may well have reached a different conclusion on the same expert, but may find the lower court's decision within its discretion. *Id.*
56 Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).
57 *Id.*
58 Note, *Admitting Doubt*, *supra* note 6, at 2031.
59 *Id.*
60 A. Leah Vickers, Daubert*, Critique and Interpretation: What Empirical Studies Tell Us About the Application of* Daubert, 40 U.S.F. L. Rev. 109, 122 (2005).
61 Note, *Admitting Doubt*, *supra* note 6, at 2031.
62 *Id.* at 2032.
63 *Id.*
64 *Id.*

science also treat determining truth differently, with the legal world relying on "zealous advocacy — within certain ethical bounds — to reach conclusions" and the scientific community relying on "an organized skepticism model based on critical peer review."[65]

Daubert also drew criticism regarding the ambiguity in the Supreme Court's language, which left lower courts guessing as to when and how to apply the four considerations.[66] For example, those states that applied the *Daubert* considerations did so inconsistently, deeming them as anywhere from rigid to flexible factors,[67] while other states, including Nevada, rejected such application, finding existing state case law on expert testimony sufficient to handle admissibility.[68]

B. *Expert Witness Admissibility in State Courts*

In state courts, the landscape of opinions on expert admissibility standards is divided and constantly changing. In 2001, 25 states used the *Daubert* analysis or a similar test, 15 states and the District of Columbia still used the *Frye* test, 6 states had not rejected *Frye* but had incorporated a *Daubert*-like analysis, and 4 states had developed their own test.[69] Just five years later in 2006, 30 states had adopted *Daubert* or deemed it consistent, 14 states had rejected *Daubert* (including Nevada), and 7 states neither accepted nor rejected *Daubert*.[70] By 2010, 31 states and the Military Courts were *Daubert* or *Daubert* leaning states, 17 states had rejected *Daubert*, and 2 states looked to *Daubert* concepts but relied on their own laws.[71] The previous statistics did not reflect the impact of *Higgs*, which placed Nevada in a more distinctive category: a state that rejects both *Daubert* and *Frye*, yet relies on its own laws.[72]

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65 *Id.*

66 Welch, *supra* note 21, at 1091.

67 *Id.*

68 White, *supra* note 2, at 32 (citing Dow Chem. Co. v. Mahlum, 970 P.2d 98, 108 (Nev. 1998), *modified on other grounds by* GES, Inc. v. Corbitt, 21 P.3d 11 (Nev. 2001)).

69 Alice B. Lustre, Annotation, *Post-*Daubert *Standards for Admissibility of Scientific and Other Expert Evidence in State Courts*, 90 A.L.R.5th 453, 481 (2001).

70 *See generally* Martin S. Kaufman, The Status of *Daubert* in State Courts (Nov. 7, 2006), http://www.atlanticlegal.org/daubertreport.pdf.

71 1 TERENCE W. CAMPBELL & DEMOSTHENES LORANDOS, CROSS EXAMINING EXPERTS IN BEHAVIORAL SCIENCES § 1:16.1 (2010). Campbell & Lorados describe those states yet to adopt *Daubert* as having "been sentenced by their Supreme Courts to wallow in the 1920s with a hopelessly out dated philosophy of science." *Id. Daubert* and "*Daubert* leaning" states include: Alaska, Arkansas, Colorado, Connecticut, Delaware, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming. *Id.* at n.6. States either rejecting *Daubert* or continuing to use *Frye*: Alabama, Arizona, California, Florida, Hawaii, Illinois, Kansas, Maryland, Minnesota, New Jersey, New York, Nevada, North Carolina, Pennsylvania, South Carolina, Washington and Wisconsin. *Id.* at n.7. The law update categorized Missouri and North Dakota as the only two states that rely on their own law. *Id.* at n.8.

72 Following *Higgs v. State*, Nevada is similar to Missouri and North Dakota because it too relies on its own laws. *See* Higgs v. State, 222 P.3d 648, 655–59 (Nev. 2010); *see infra* Part IV.

C. Missouri and North Dakota: States that Rely on Their Own Expert Witness Statutes

To understand the realistic options for the future of Nevada's expert admissibility standard, it helps to look at other states that rely on their own regulations and case law. In Missouri, neither *Frye* nor *Daubert* controls a state court's admission of expert testimony in civil cases.[73] Missouri Revised Statutes (MRS) section 490.065 is the controlling standard,[74] and it states:

> 1. In any civil action, if scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.
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> 2. Testimony by such an expert witness in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
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> 3. The facts or data in a particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing and must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable.
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> 4. If a reasonable foundation is laid, an expert may testify in terms of opinion or inference and give the reasons therefor without the use of hypothetical questions, unless the court believes the use of a hypothetical question will make the expert's opinion more understandable or of greater assistance to the jury due to the particular facts of the case.[75]

Only portions of subsections (1) through (3) mirror the Federal Rules of Evidence,[76] and the Missouri Legislature created the rest of the statute.[77] Commentators note that the Supreme Court of Missouri intended MRS 490.065 to

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[73] McGuire v. Seltsam, 138 S.W.3d 718, 720 n.3 (Mo. 2004).

[74] *Id.* at 720; State Bd. of Registration for Healing Arts v. McDonagh, 123 S.W.3d 146, 153 (Mo. 2003). "Forget *Frye*. Forget *Daubert*. Read the statute. Section 490.065 is written, conveniently, in English. It has 204 words. Those straightforward statutory words are all you really need to know about the admissibility of expert testimony in civil proceedings." *Id.* at 160 (Wolff, J., concurring in part and dissenting in part) (footnote omitted).

[75] MO. ANN. STAT. § 490.065 (West 1996).

[76] *See* FED. R. EVID. 702–04.

[77] See Care & Treatment of T.D. v. State, 199 S.W.3d 223, 227 (Mo. Ct. App. 2006) (citing Goddard v. State, 144 S.W.3d 848, 854 (Mo. Ct. App. 2004)) ("The legislature recognized that it was inconsistent to allow experts to rely on hearsay while practicing their profession, but not let them rely on hearsay when rendering their opinion in court, unless substantial time and money were expended to bring those facts forth and put in evidence. It remedied this inconsistency by enacting section 490.065.3." (internal quotation marks omitted)); 22A WILLIAM A. SCHROEDER, MISSOURI PRACTICE SERIES, MISSOURI EVIDENCE § 703.1 (3d ed.) (citing Hopkins, *Expert Testimony, New Rules, New Questions*, 46 J.MO.BAR 175, 176 (1990)) (observing that "[p]rior to the enactment of section [490.065] (3), Missouri practice permitted an expert to testify to opinions based upon admissible evidence made known to the expert in three different manners: (1) facts perceived by the expert, (2) facts made known to the expert at trial, and (3) assumed facts supported by the evidence." (internal quotation marks omitted)). For an overview of the expert witness standard in Missouri, see Jaime M. Nies, Note, *Say Goodbye to* Frye*: Missouri Supreme Court Clarifies Standard for Admitting Expert Testimony in Civil and Administrative Cases*, 69 MO. L. REV. 1203 (2004).

be a meaningful standard for trial court judges to assess expert witness testimony.[78]

Currently, Missouri trial courts have "sound discretion" in determining whether experts in a particular field used data or facts reasonably or if that particular methodology is "reasonably reliable."[79] An appellate court will only find that the trial court abused its discretion when a decision is against logic and is so "arbitrary and unreasonable" that it indicates a lack of consideration.[80] Although Missouri court judges have enormous discretion, they will refuse to admit expert testimony when experts base opinions on assumptions not supported in the evidence.[81] For example, in *McGuire v. Seltsam*, the Supreme Court of Missouri found that a forensic psychiatrist's expert testimony about a motorist's alleged somatization disorder was inadmissible in a personal injury action.[82] The psychiatrist based her diagnosis, which was that the motorist's earlier medical records would have contained notes pertaining to somatic complaints, on "speculation and conjecture" not supported by the evidence.[83]

Similarly, in North Dakota, neither *Frye* nor *Daubert* control a trial court's admission of expert testimony.[84] Rule 702 of the North Dakota Rules of Evidence (NDRE) governs expert testimony and states, "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."[85]

Although NDRE 702 is identical to the early form of FRE 702,[86] North Dakota trial court judges have "sound discretion" in determining whether an expert is qualified.[87] NDRE 702 "envisions generous allowance" of the admittance of expert testimony for witnesses who show some degree of expertise in the area that they wish to testify, but expert testimony must also be reliable and relevant.[88] If an expert's knowledge, training, education, and experience will assist the trier of fact, the expert does not have to be a specialist or certified in a very specialized field.[89] Only when the trial court "acts in an arbitrary, unreasonable, or unconscionable manner" or "misapplies the law" will the decision be reversed as an abuse of discretion.[90]

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[78] Michael D. Murphy & Ross D. McFerron, *Expert Challenges in Missouri Civil Cases After* McDonagh, 64 J. Mo. B. 86, 92 (2008).
[79] *McGuire*, 138 S.W.3d at 720–21.
[80] *Id.* at 720.
[81] *Id.* at 722.
[82] *Id.*
[83] *Id.*
[84] *See* Hamilton v. Oppen, 653 N.W.2d 678, 683 (N.D. 2002) (noting the use of NDRE 702 and subsequent state court decisions to guide court decisions regarding the admissibility of expert testimony).
[85] N.D. R. Evid. 702.
[86] The Supreme Court amended FRE 702 following *Daubert* in 1993, yet NDRE 702 remains purposely identical to the prior version of FRE 702. *See* Fed. R. Evid. 702 (as amended on Apr. 17, 2000).
[87] *Hamilton*, 653 N.W.2d at 683.
[88] *Id.* (internal quotation marks omitted).
[89] State v. Hernandez, 707 N.W.2d 449, 453 (N.D. 2005).
[90] *Id.* at 454.

Commentators call North Dakota's stance on expert testimony "extremely liberal," and note that the Supreme Court of North Dakota has "more faith in the jury system" than do the federal courts.[91] If an expert has appropriate credentials, trial court judges will be more prone to admissibility as North Dakota still follows the earlier pre-*Daubert* readings of FRE 702, which allow broad use of witnesses who have some degree of expertise in their field.[92]

North Dakota is not alone in its resiliency in making its own decisions regarding the adoption of federal rules or standards. Other states have laws that differ significantly from *Daubert* and *Frye*. Nevada has also set its own path.

D. The Evolution of Nevada's Modern Expert Witness Admissibility Standard

Nevada never expressly adopted the "general acceptance" standard as set out in *Frye*.[93] Following the adoption of the FRE, Nevada chose to regulate admissibility by statute, specifically NRS 50.275.[94] NRS 50.275 closely mirrors the language of FRE 702 before it was amended in response to the *Daubert* trilogy.[95] In spite of this similarity, Nevada remained independent from federal jurisprudence by using a rule that granted trial courts broad discretion.[96] However, in Nevada, much like in federal court, the applicable standard of review is the abuse of discretion standard.[97] Thus, a district court's discretion in following NRS 50.275 must be "manifestly wrong" in order for the Supreme Court of Nevada to reverse—and generally the district court is in a better position to judge testimony with regard to material facts.[98]

E. Nevada Cases Setting the Stage for Higgs

The Supreme Court of Nevada had several notable opportunities to address admissibility standards prior to its most recent discussion in *Higgs v. State*. In *Yamaha Motor Co., U.S.A. v. Arnoult*, a products liability and negligence suit, the Supreme Court held that the trial court had not abused its discretion in admitting expert testimony regarding the adequacy of safety warnings within an owner's manual for an all-terrain vehicle.[99] The Yamaha, a four-wheel all-terrain vehicle, flipped forward when only moving half its maximum speed and catastrophically injured the plaintiff.[100] The expert, who had a doctorate and masters in industrial engineering, testified that while the Yamaha's owner's manual contained adequate warnings about the possibility of flipping backward in certain situations, those warnings did not adequately alert the

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[91] *Expert Witness*, THE BUCKLIN ORG., http://www.bucklin.org/research/NDexpertWitness.htm (last visited Dec. 5, 2011).
[92] *Id.*
[93] Stempel, *supra* note 4, at 10–11.
[94] *Id.* at 10.
[95] *Id.*; *see infra* Part IV.B (analyzing the text of NRS 50.275).
[96] Brian Irvine, Note, *Waiting for* Daubert*: The Nevada Supreme Court and the Admissibility of Expert Testimony*, 2 NEV. L.J. 158, 162–63 (2002).
[97] Thompson v. State, 221 P.3d 708, 713 (Nev. 2009).
[98] *Id.* at 713–14 (internal quotation marks omitted).
[99] Yamaha Motor Co., U.S.A. v. Arnoult, 955 P.2d 661, 668 (Nev. 1998).
[100] *Id.* at 664.

driver to the possibility of flipping forward.[101] The jury awarded the plaintiff over three million in damages, basing liability on a failure to warn.[102] Yamaha appealed, arguing that the trial court failed its "gatekeeping" duty by admitting opinion testimony that the expert had not based on scientific evidence.[103] The Supreme Court of Nevada made clear that "[t]o date, we have not adopted the *Daubert* test" and the expert had adequate credentials to testify as to the sufficiency of warnings.[104] The Court's rationale seemed to hinge on finding that the assessment of the warnings involved "specialized knowledge" that *could* require expertise, even if it did not implicate any "laws of science."[105] Because the evaluation of the manual required specialized knowledge, it mirrored the language NRS 50.275 called for.[106] Under the abuse of discretion standard, the Supreme Court of Nevada was hesitant to disturb the trial court's "sound discretion in determining the competency of an expert witness."[107]

In *Dow Chemical Co. v. Mahlum*, the Supreme Court of Nevada once again used NRS 50.275 as the admissibility standard regarding a causation issue in a fraud and negligence suit involving ruptured silicone breast implants.[108] The plaintiff, Mahlum, had received breast implants as part of reconstructive surgery following a mastectomy.[109] A few years later, Mahlum's health began to worsen and, after an implant ruptured, surgeons surgically removed both implants.[110] Unfortunately, the surgeon was unable to remove all of the silicone that had leaked from the ruptured implant and it remained rooted in Mahlum's muscles, tissue, and blood vessels.[111] Later, Mahlum filed suit alleging that the ruptured implant had caused her to contract an uncommon autoimmune disease.[112] The jury returned a verdict against Dow Chemical, the

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[101] *Id.* at 667–68.
[102] *Id.* at 664.
[103] *Id.* at 667.
[104] *Id.* In addition, numerous corporations had previously enlisted the same expert in the past. *Id*. at 668.
[105] *Id.* at 667. At this point in time, the Supreme Court had not yet decided *Kumho Tire Co. v. Carmichael*, which extended the *Daubert* standard to all expert testimony. *See* Kumho Tire Co. v. Carmichael, 526 U.S. 137, 141 (1999).
[106] *Yamaha*, 955 P.2d at 667. The Supreme Court of Nevada restated the threshold for admissibility as turning "on whether the expert's specialized knowledge will assist the trier of fact in understanding the evidence or an issue in dispute." *Id.* (citing Townsend v. State, 734 P.2d 705, 708 (Nev. 1987)).
[107] *Id.* at 668.
[108] Dow Chem. Co. v. Mahlum, 970 P.2d 98, 107 (Nev. 1998), *modified on other grounds by* GES, Inc. v. Corbitt, 21 P.3d 11 (Nev. 2001).
[109] *Dow Chem.*, 970 P.2d at 106. The Silastic II implants contained a clear outer shell of silicone rubber. *Id.* Dow Corning had marketed and manufactured the Silastic II implant alone, although Dow Corning was professionally intertwined with Dow Chemical, who did quality inspections and could "approve or disapprove any products manufactured, distributed or sold under the Dow Chemical trademark." *Id.* at 105.
[110] *Id.* at 106.
[111] *Id.*
[112] *Id.* Specifically, one doctor testified that Mahlum's symptoms were consistent with "multiple-sclerosis-like autoimmune disease, axonal neuropathy, and demyelinization, all of which are caused by antibodies attacking her nervous system." *Id.* at 108. Another doctor testified that breast implants could cause "atypical autoimmune disease" characterized by "symptoms of fatigue, joint and muscle pain, sleep disturbances, hair loss, skin rashes, dryness of the eyes and mouth, and numbness or tingling in [the] hands and feet." *Id.* at 109.

implant manufacturer, in excess of 14 million dollars.[113] Dow Chemical appealed on several grounds, and argued that the court had improperly denied its motion for a new trial on the grounds of erroneous admission of expert witness testimony regarding the causation issue.[114]

The Supreme Court of Nevada upheld the judgment against Dow Chemical on the negligent performance claim and held that the trial court did not err in denying a motion for a new trial.[115] Mahlum provided causation evidence, critical to a negligent performance claim, in the form of expert testimony, which the trial court properly certified.[116] Of the three experts, the most controversial was a rheumatologist who concluded that the ruptured breast implants caused Mahlum's symptoms; this testimony was based on the rheumatologist's treatment of Mahlum and over one hundred other women with silicone breast implants.[117] One commentator pointed out that the rheumatologist's testimony would have likely failed *Daubert*'s reliability test, as the rheumatologist's findings had not been published or otherwise subjected to peer review, her methods were not generally accepted, and where the conclusions had not yet been tested, no error rate had been established.[118]

The Supreme Court of Nevada acknowledged that causation was a scientifically controversial component of Mahlum's breast implant case, but it held that Mahlum did not have to wait until the scientific community had developed a consensus of whether ruptured silicone implants caused her disease.[119] It recognized that if Mahlum were forced to wait, she may not be able to recover because of the doctrine of laches and statute of limitations, and it also noted that the case "was not tried in the court of scientific opinion, but before a jury of her peers."[120] The jury properly considered the evidence under the preponderance of evidence standard and concluded that silicone had caused Mahlum's autoimmune disease.[121] The Court found substantial causation evidence because the standard of proof that guides a jury is lower than the standard of proof for declaring truth in science.[122]

After *Dow Chemical*, at least one commentator argued that the Supreme Court of Nevada should completely adopt *Daubert* because the state courts needed the same degree of predictability or reliability as federal courts.[123] A Nevada state court was likely to look into the qualifications of a witness rather than a scientific basis and leave the less qualified jury to decide credibility.[124] The liberal rules allowed experts to put forth opinions that science had not tested and data did not support.[125] The Supreme Court of Nevada could instead

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[113] *Id.* at 106.
[114] *Id.* at 106–07.
[115] *Id.* at 107.
[116] *Id.* at 107–08.
[117] *Id.* at 109.
[118] Irvine, *supra* note 96, at 169.
[119] *Dow Chem.*, 970 P.2d at 109.
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *See* Irvine, *supra* note 96, at 160.
[124] *Id.* at 165.
[125] *Id.* at 176 (commenting that the Nevada rules are more "liberal" than the federal rules).

"insulate the jury from flawed science" if, in cases like *Dow Chemical*, the Court gave proper guidelines to the trial court for examining methodology.[126]

In 2004, a case would further complicate the admissibility standard in Nevada state courts. In *Banks* ex rel. *Banks v. Sunrise Hospital*, the Supreme Court of Nevada affirmed the trial court's judgment and held that the witness did not need to base testimony on a reasonable degree of medical certainty regarding the malfunctioning of anesthesia equipment during a patient's surgery.[127] In addition, the particular facts warranted testimony from an expert concerning calculating hedonic loss.[128] The plaintiff in *Banks* was a 51-year-old patient who had gone into cardiac arrest during a rotator cuff surgery at Sunrise Hospital.[129] During the surgery, the plaintiff was connected to a Narkomed II anesthesia machine, which was designed to provide oxygen and anesthetic agents to patients.[130] During the surgery, doctors noticed a decrease in Banks's blood pressure and unsuccessfully increased oxygen, administered Robinal (to increase heart rate), and twice administered ephedrine to increase pulse rate.[131] Physicians, including a cardiologist, then attempted to shock Banks's heart rate back to a normal rhythm multiple times, attempted cardiopulmonary resuscitation, and administered atropine before finally getting the heart back to a normal rhythm.[132] Tragically, Banks did not regain consciousness following the surgery and remained in a "permanent vegetative state."[133] Sunrise prepared an occurrence report that made no mention of errors involving the anesthesia equipment, and Sunrise later sold the anesthesia equipment used during Banks's surgery along with other equipment to the same buyer.[134]

Within a year, Banks's guardian brought negligence claims against multiple defendants, including Sunrise Hospital.[135] More than two years after first filing the claims, and nearly four years after the incident, Banks's guardian amended the complaint to assert an additional claim for negligence pertaining to the maintenance of the anesthesia equipment.[136] Prior to trial, Banks had sought sanctions based on Sunrise's failure to preserve the anesthesia equipment used during Banks's surgery.[137] The district court determined that Sunrise had spoiled the evidence by failing to identify the specific equipment from Banks's surgery before selling the equipment and gave an instruction to the jury that indicated it could infer that if Sunrise had preserved the equipment, an

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[126] *Id.* at 169.
[127] Banks *ex rel.* Banks v. Sunrise Hosp., 102 P.3d 52, 61 (Nev. 2004).
[128] *Id.* at 62. Hedonic loss refers to testimony that "attempts to place a dollar value on either 'lost enjoyment of life' or 'loss of society or relationship'." Thomas R. Ireland, *The Last of Hedonic Damages: Nevada, New Mexico, and Running a Bluff*, 16 J. LEGAL ECON. 91, 91 (2009) (discussing how Nevada and New Mexico are the only remaining "battleground states" where expert testimony concerning hedonic damages has a chance of being admissible).
[129] *Banks*, 102 P.3d at 56–57.
[130] *Id.* at 56.
[131] *Id.* at 57.
[132] *Id.*
[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.* at 57–58.
[137] *Id.* at 58.

inspection would have indicated the machine was not operating properly.[138] Following an initial hung jury, a second trial's jury awarded Banks damages in an amount of nearly five million dollars.[139] Sunrise appealed, claiming numerous errors including the admittance of expert testimony regarding a duty to preserve the anesthesia equipment, opinion testimony concerning the equipment malfunctioning, and testimony concerning hedonic damages.[140]

The Court held that the district court did not abuse its discretion in permitting Banks's experts to testify concerning Sunrise's duty to preserve the anesthesia equipment.[141] The Court found the evidence had assisted the jury in understanding the critical issue of whether or not a malfunction had occurred during the surgery.[142] The Court noted that expert testimony was required to establish a standard of care in medical malpractice cases, and the existence of a duty to preserve the equipment was relevant to standard of care.[143] In addition, the Court found that expert Robert Morris's testimony concerning the anesthesia equipment malfunction was more than just speculative, and since the testimony assisted the jury in understanding how the machines "could" malfunction, the district court had not abused its discretion in permitting "opinion testimony based on less than a reasonable degree of probability."[144] Morris's testimony concerned what might have happened by explaining the possible ways that such an anesthesia machine could malfunction; he also explained that he could not determine what happened during Banks's surgery since Sunrise did not identify which machine it had used prior to selling that model of machines.[145] The Court found that this testimony established the possibility that the particular anesthesia machine could have "malfunction[ed] intermittently" and that it therefore aided the jury in understanding why it was reasonable to draw an inference from Sunrise's failed identification prior to sale.[146]

With regard to the testimony on hedonic damages, the Court aligned itself with other jurisdictions that recognize that this type of specialized knowledge can assist the jury in computing damages.[147] Banks's expert offered testimony

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[138] *Id.*

[139] The jury in the second trial awarded $5,412,030 in damages totaling $6,903,044 after adding prejudgment interest on past damages. *Id.* The district court then reduced the jury by the 1.9 million that the co-defendant doctors had previously paid in a prior settlement, resulting in a final amount of $4,825,450. *Id.*

[140] *Id.* at 60–61.

[141] *Id.* at 60.

[142] *Id.*

[143] *Id.*

[144] *Id.* at 61. In *Morsicato v. Sav-On Drug Stores, Inc.*, the Supreme Court of Nevada stated the finding in *Banks* related to the operation of medical equipment and should be narrowly construed because "the standard of care and causation in a medical malpractice case . . . must be based on testimony made to a reasonable degree of medical probability." 111 P.3d 1112, 1115 (Nev. 2005).

[145] *Banks*, 102 P.3d at 61. Morris went as far as stating, "'[a]ny device can fail any time,'" and "'[e]veryone I have spoken to who had Narkomed 2s for any length of time experienced failures in the interlock system.'" *Id.* (alteration in original).

[146] *Id.*

[147] *Id.* at 62. Hedonic damage models aim to put a meaningful and accurate measure on the value of human life. Joseph A. Kuiper, Note, *The Courts,* Daubert*, and Willingness-to-Pay: The Doubtful Future of Hedonic Damages Testimony Under the Federal Rules of Evidence*, 1996 U. ILL. L. REV. 1197, 1206 (1996). The willingness-to-pay theory "is founded on the

that a total award could be determined by comparing figures derived from two methods within a "willingness to pay" theory[148]: the "survey" method[149] and a "wage risk" method.[150] The Court found that such methodology was within the expert's specialized knowledge and the testimony assisted the jury in understanding adequate compensation values for Banks's loss of enjoyment of life.[151] Thus, the district court had exercised proper discretion in qualifying Johnson as an expert, and Sunrise could have used traditional methods such as cross-examination or providing its own witnesses to attack the expert's reliability.[152] Some scholars viewed the *Banks* decision as one driven by "tragic circumstances."[153] In addition, other scholars viewed this decision as paving the way for an "anything goes" approach concerning expert's methodology for calculating hedonic damages in Nevada.[154] This can be troubling because courts cannot take such an approach lightly, as hedonic damages for catastrophic injuries can generate potentially enormous awards.[155]

F. Problematic Admissibility Considerations in Hallmark v. Eldridge

The Supreme Court of Nevada, like many other state courts, has been hesitant to embrace *Daubert* fully, but it has come very close.[156] In *Hallmark v. Eldridge*, the Supreme Court of Nevada reversed and remanded a judgment because the district court abused its discretion by allowing testimony that did not assist the jury in reaching a decision.[157] In that case, biomechanical engineer expert Dr. Bowles testified regarding the potential of forces in an accident.[158] The plaintiff, Hallmark, had sued to recover damages for serious personal injuries allegedly sustained when the defendant's truck backed into the plaintiff's parked car.[159] Dr. Bowles testified that a collision could not have

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premise that the true value society places on human life can be determined by measuring the expenditures individuals, government agencies, and businesses are willing to make or require to reduce risks of injury or death." *Id.*

[148] *Banks*, 102 P.3d at 62–63. Johnson's methodology determined that the tangible value of a person's life could be, at lowest, \$2.5 million, with an average of \$8.7 million and no ceiling. *Id.* at 63.

[149] The "survey" method involves asking people what amount they would be willing to pay to reduce the probability of death. *Id.* at 63.

[150] The "wage risk" method compares the salaries people in high fatality risk jobs receive compared to the amount people will give up to work in lower risk jobs. *Id.*

[151] *Id.* Although NRS 48.035 tempered admissibility, the probative value of the hedonic damage testimony "was not substantially outweighed by the danger of unfair prejudice." *Id.* at 62–63.

[152] *Id.* at 63.

[153] *Nevada High Court Endorses "Hedonic" Damage Awards*, NEV. L. BULL. (Erickson, Thorpe & Swainston, Ltd., Reno, Nev.), Spring 2005, at 4, http://www.etsreno.com/wp-content/uploads/2011/01/June2005a.pdf. Scholars noted that traditionally courts only allow a jury to draw an inference concerning suppression to situations where a party "willfully" destroys evidence, which was very different from Sunrise Hospital's conduct in *Banks*. *Id.*

[154] *See* Ireland, *supra* note 128, at 94.

[155] Erickson, Thorpe & Swainston, *supra* note 148, at 4.

[156] Stempel, *supra* note 4, at 12.

[157] Hallmark v. Eldridge, 189 P.3d 646, 655 (Nev. 2008).

[158] *Id.* at 649.

[159] *Id.* at 648. *See supra* Introduction for narration closely resembling the actual factual background in *Hallmark*.

caused the injuries to Hallmark's spine, and instead diabetes, a pre-existing condition, was the cause.[160] Dr. Bowles formed his opinions by relying only on an examination of the company truck, the court records, Hallmark's medical records, and photographs of Hallmark's vehicle.[161]

The Court found that the district court did not err in qualifying Dr. Bowles as an expert based on credentials.[162] However, Dr. Bowles's "testimony and report did not assist the jury in understanding the evidence or in determining a fact in issue."[163] The assistance requirement rooted in NRS 50.275[164] hinged on whether the testimony was "relevant and the product of reliable methodology."[165] There was no evidence that Dr. Bowles's opinions were capable of being tested or had been tested, had been subject to peer review, or were generally accepted in the scientific community.[166] The Court found the expert's opinions to be "highly speculative" and questioned their relevance, since they were formed without knowledge of many pertinent factors[167] and without any attempt to re-create the accident.[168]

The Supreme Court of Nevada also relied on federal district court and appellate court case law to support its finding that the state district court should have excluded Dr. Bowles's unreliable testimony.[169] The Court cited Fourth Circuit, Sixth Circuit, and Seventh Circuit cases as support for a finding that Dr. Bowles's testimony was "based more on supposition than science."[170] The Supreme Court of Nevada ultimately concluded that the district court had abused its discretion in admitting Dr. Bowles's expert testimony "because his testimony did not satisfy the 'assistance' requirement of NRS 50.275."[171]

Commentators noted that the *Hallmark* decision closely tracked those considerations in *Daubert*,[172] a more than reasonable conclusion considering the Court seemed to base its decision on "relevance" and "reliability,"[173] the two most critical components of the *Daubert* standard.[174] Furthermore, *Hallmark* applied the exact same factors for reliable methodology[175] as those set out in

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160 *Hallmark*, 189 P.3d at 649.
161 *Id.*
162 *Id.* at 651.
163 *Id.* at 652.
164 *See infra* Part IV.B (test of NRS 50.275).
165 *Hallmark*, 189 P.3d at 651 (footnote omitted).
166 *Id.* at 652.
167 *Id.* at 652–53. Dr. Bowles conceded to forming his opinion "without knowing (1) the vehicles' starting positions, (2) their speeds at impact, (3) the length of time that the vehicles were in contact during impact, or (4) the angle at which the vehicles collided." *Id.*
168 *Id.* at 653.
169 *Id.*
170 *Id.* at 653–54.
171 *Id.* at 654.
172 *See* Stempel, *supra* note 4, at 12.
173 *Hallmark*, 189 P.3d at 651.
174 Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 594–95 (1993).
175 *Hallmark*, 189 P.3d at 651–52. ("[A] district court should consider whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization." (footnotes omitted))

Daubert.[176] Additionally, *Hallmark* used federal appellate court cases to support its finding of an abuse of discretion in state court.[177] Eventually, the Court tied back the holding to NRS 50.275, but only after a separate in-depth analysis that shared many *Daubert* considerations.[178] It is no wonder why future commentators, scholars,[179] and litigants came to interpret the *Hallmark* decision as an adoption of the *Daubert* standard.[180] Nevada's admissibility standard definitely needed clarification.

III. *Higgs v. State*

In *Higgs v. State*, the Supreme Court of Nevada reaffirmed and attempted to clarify Nevada's standard for expert testimony.[181] In *Higgs*, the defendant appealed his first-degree murder conviction on multiple grounds.[182] Higgs had allegedly poisoned his wife Augustine by injecting her with succinylcholine.[183] Kim Ramey, a critical care nurse who worked with Higgs, had multiple conversations with Higgs on July 7, 2006, that became critical to the state's case.[184] Higgs had shared with Ramey that he was having marital problems and intended to seek a divorce.[185] That same day, Higgs brought up a widely publicized homicide case involving a husband killing his wife and had commented, "That guy did it wrong. If you want to get rid of someone, you just hit them with a little succ[inylcholine] because they can't trace it [postmortem]."[186]

In the early morning of July 8, 2006, Higgs called emergency personnel to his home, claiming to have found his wife unresponsive.[187] Upon learning of Augustine's hospital admittance, Ramey informed a colleague of her previous conversations with Higgs.[188] Soon Augustine's attending physician was up to speed and obtained a urine sample from Augustine before the doctors removed her from life support a few days later.[189] The hospital's toxicology testing and the coroner's analysis of postmortem tissue samples showed no signs of succinylcholine, but specimens sent to the FBI tested positive for succinylcholine and succinylmonocholine.[190] On appeal, Higgs challenged the admittance of

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[176] *See supra* note 30 for a list of *Daubert* reliable methodology factors.
[177] *Hallmark*, 189 P.3d at 653–54.
[178] *Id.* at 654.
[179] *See* Stempel, *supra* note 4, at 12.
[180] Jennifer L. Braster, *Expert Testimony in the Wake of* Hallmark *and* Higgs*—Has the Supreme Court of Nevada Adopted* Daubert*?*, COMMUNIQUÉ, Jan. 2011, at 30, 30.
[181] Higgs v. State, 222 P.3d 648, 650 (Nev. 2010).
[182] *Id.* at 653–55.
[183] *Id.* at 650. Succinylcholine, the alleged cause of death, "'is a very unstable compound that breaks down rapidly to produce succinylmonocholine, a less unstable compound that breaks down to form succinic acid and choline, which are naturally present in the human body.'" *Id.* at 650 n.2 (quoting Sybers v. State, 841 So. 2d 532, 542 (Fla. Dist. Ct. App. 2003)). Higgs, an experienced nurse, had access to succinylcholine through his employment. *Id.* at 650–51.
[184] *Id.* at 650.
[185] *Id.*
[186] *Id.* (second alteration in original).
[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.*

the FBI toxicologist's expert testimony regarding succinylcholine testing and urged the Court to adopt the federal admissibility standard.[191]

The Supreme Court of Nevada flatly rejected the notion that the *Hallmark* decision had adopted the *Daubert* standard.[192] The Court declined adoption and sought to avoid the rigid application of enumerated *Daubert* factors.[193] It noted that gatekeepers would encounter an overlap of factors concerning relevancy and reliability, but that *Daubert* is persuasive only in its promotion of a flexible approach.[194] The Court also clarified that "NRS 50.275 is the blueprint for the admissibility of expert witness testimony" in Nevada,[195] then discussed the differences between NRS 50.275 and FRE 702.[196]

Higgs identified three overarching requirements pursuant to NRS 50.275: qualification, assistance, and limited scope.[197] The Court also noted two benefits to its approach: it gives judges wide discretion, and it permits an inquiry based on the law rather than upon scientific principles[198]—a benefit in accordance with Chief Justice Rehnquist's cautionary dissent from *Daubert*.[199] The Court explained the requirements do not force a judge to determine either scientific falsifiability or an error rate, two notably difficult factors for judges to evaluate.[200] Additionally, within the confines of NRS 50.275, there remains a degree of regulation upon testimony admittance so the rule does not usurp "the trial judge's gatekeeping function."[201]

Higgs considered various factors for each of the three overarching requirements of NRS 50.275.[202] Qualification factors include whether an expert has "formal schooling, proper licensure, employment experience, and practical experience and specialized training."[203] The assistance requirement goes to the relevancy of the opinion and reliability of the methodology.[204] Reliable methodology factors include whether the "opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based on more particularized facts rather than assumption, conjecture, or generalization."[205] Limited scope requirements include assessing

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[191] *Id.* at 655 (noting Higgs' invitation for the Court to adopt the *Frye* or *Daubert* standard, under which the Court presumably would hold inadmissible the FBI expert's testimony regarding succinylcholine, the cause of death).
[192] *Id.* at 650.
[193] *Id.* at 657–58 (re-affirming flexibility within Nevada state courts in not limiting considerations).
[194] *Id.*
[195] *Id.* at 658.
[196] *See infra* Part IV.B.
[197] *Higgs*, 222 P.3d at 658 (citing Hallmark v. Eldridge, 189 P.3d 646, 650 (Nev. 2008)).
[198] *Id.* at 659.
[199] *Daubert*, 509 U.S. 598, 601 (Rehnquist, C.J., concurring in part and dissenting in part).
[200] *Higgs*, 222 P.3d at 659. In a footnote, the Court briefly discussed the studies that show judiciary difficulty in understanding the falsifiability factor from *Daubert*. *See id.* at 659 n.5.
[201] *Id.* at 658–59.
[202] *Id.* at 659–60.
[203] *Id.* at 659.
[204] *Id.* at 660.
[205] *Id.* (quoting Hallmark v. Eldridge, 189 P.3d 646, 651–52 (Nev. 2008)).

whether the testimony consists of highly particularized facts and is limited to matters within the scope of the expert's knowledge.[206]

Ultimately, the Court concluded that the district court did not abuse its discretion when it allowed the FBI toxicologist to testify about the procedures and methodologies used in testing for the presence of succinylcholine within the victim.[207]

IV. Analysis of *Higgs* and Proposed Modifications

Because the standard for expert witness admissibility, as re-affirmed in *Higgs*, leaves judges wide discretion[208] concerning how to apply a non-exhaustive list of multiple factors, the standard will likely result in inconsistent and unpredictable application. What little guidance the Court left for judges to assess the qualification, assistance, and limited scope requirements did not provide for a clear test or analysis that future courts should undertake. Subsequent to *Higgs*, the Court noted that it had "expressly rejected the adoption of federal authority that employs mechanical application of factors regarding qualifications of expert witnesses."[209] Thus, without a clear test to guide future courts, the Supreme Court of Nevada must further clarify the analysis it expects courts to undertake to address the true implications and impact on future expert testimony within the state.

The following analysis of *Higgs* first looks at the possible ramifications of an admissibility standard with so many similarities to *Daubert*, the finality of an abuse of discretion review standard, and the real potential to waste judicial resources. Next, the analysis turns to the option of achieving a workable framework within NRS 50.275 that incorporates the Court's objectives as set out in *Higgs*.

A. *Ramifications of the* Higgs v. State *Standard*

The Supreme Court of Nevada in *Higgs* aimed at reaffirming the standard for admissibility of expert witness testimony in Nevada, yet further complicated its application. In comparing the Nevada standard to the disadvantages of *Daubert*, *Higgs* cited multiple circuit court opinions as examples of the inconsistent use of *Daubert* factors.[210] Despite trying to avoid a *Daubert*-type list of factors, *Higgs* applied a non-exhaustive list of an even greater number of factors for the judiciary's general guidance, to be applied as necessary on a case-to-case basis.[211] The Court gave absolute discretion to trial court judges by

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[206] *Id.*
[207] *Id.*
[208] Cramer v. State, Dep't of Motor Vehicles, 240 P.3d 8, 12 (Nev. 2010) (discussing that after *Higgs* a district court judge has "wide discretion" regarding "gatekeep[ing]" duties and holding an affidavit inadmissible to prove a person's blood alcohol content when the affidavit had come from a person who had not previously been qualified as an expert in district court (internal quotation marks omitted)).
[209] Bahena v. Goodyear Tire & Rubber Co., 235 P.3d 592, 596 n.4 (Nev. 2010) (clarifying the Supreme Court of Nevada's rationale in not adopting a standard of review for discovery sanctions that tracked federal authority when such review contradicted Nevada state law).
[210] *Higgs*, 222 P.3d at 657.
[211] *Id.* at 659–60.

allowing them to decide which of the many factors to consider.[212] Many litigants want certainty and judges need guidance.[213]

Another reason *Higgs* declined to adopt *Daubert* was to limit judges' inquiries to the law rather than science,[214] but the *Higgs* standard is vulnerable to many of the same weaknesses commentators have criticized in the *Daubert* standard.[215] Such a high level of flexibility based on legal inquiry raises concerns regarding the admittance of junk science or inconsistent decisions.[216] The Court recently categorized the *Higgs* standard as an even "more deferential and flexible standard" than that of *Daubert*.[217]

Though commentators criticized the lack of clarity regarding the application of the four non-exhaustive *Daubert* factors,[218] the *Higgs* standard contains an excess of ten factors for judges' consideration with little direction as to whether and how to assess the three overarching requirements of qualification, assisting the jury, and scope.[219] The Supreme Court of Nevada's denunciation of *Daubert* was inconsistent with the standard it espoused; the Court emphasized relevance and reliability in methodology as the cornerstones of its "assisting a jury" requirement,[220] but those concepts directly overlap the *Daubert* factors.[221]

The need for further clarification is even more apparent when one considers that the level of review is abuse of discretion. Trial court judges cannot guess at how to apply factors with so much at stake. It will be nearly unattainable for a defendant to demonstrate abuse of discretion, and it would only occur because of a rare instance where the district court might apply an incorrect law,

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[212] *Id.* at 659.

[213] Note, *Reliable Evaluation*, *supra* note 26, at 2163.

[214] *Higgs*, 222 P.3d at 659.

[215] Commentators point out that the *Higgs* decision teaches attorneys to "always check the controlling jurisdiction's laws first." Braster, *supra* note 180, at 31. It could be the difference of getting an expert admitted. *Id.*

[216] *See* Welch, *supra* note 21, at 1094 (discussing the flexibility of the four *Daubert* factors raising junk science concerns and inconsistent application). *But see* Stempel, *supra* note 4, at 13 (concluding that "[a]lthough *Higgs* marks a withdrawal from *Hallmark*, in favor of traditional Nevada expert evidence law rather than an implicit embrace of the federal *Daubert* standard, the *Higgs* precedent, as applied in *Thomas*, demonstrates that the Nevada Supreme Court and state trial courts retain substantial power to limit the admissibility of expert evidence seen as suspect or misleading"). In *Thomas v. Hardwick*, the Supreme Court of Nevada declined to equate "recall bias" with previously admitted testimony concerning the flaws in cross-cultural eyewitness identification. 231 P.3d 1111, 1119 (Nev. 2010). "Recall bias" is the human tendency to recall with greater certainty the details of events leading up to a rare outcome. *Id.* The Court found no published case admitting recall bias testimony to attack a lone witness's credibility, and determined that "recall bias testimony invades the province of the jury and seems unhelpful." *Id.* Even though *Higgs* is more flexible than the federal standard, recall bias testimony was inadmissible specifically because it would not assist the jury. *Id.* at 1119 n.10.

[217] *Thomas*, 231 P.3d at 1119 n.10.

[218] Welch, *supra* note 21, at 1094.

[219] *See* Higgs, 222 P.3d at 659–60.

[220] *Id.* at 660.

[221] *Id.* at 658 (discussing "the inevitable overlap of [federal] factors [Nevada judges] will consider, mainly relevance and reliability").

follow the "wrong procedure," or commit a "clear error in judgment."[222] The Supreme Court of Nevada will likely find it difficult to overrule the district courts because the lack of clarification leaves little certainty regarding what constitutes a mistake; therefore, the trial courts will exercise sole discretion, in likely inconsistent admissibility decisions, because it is virtually impossible to tell what constitutes an abuse of discretion in this area.[223]

Finally, some commentators praised Nevada's initial rejection of *Daubert* prior to *Higgs* because of the potential to conserve judicial resources by limiting pre-trial motions that tactically attempted to use the complex federal admissibility standard as a "sword" to limit non-favorable evidence.[224] However, the *Higgs* decision presents numerous flexible factors without providing clarity as to their application, and this may lead to the waste of judicial resources. With uncertainty as to the factors' relative weight or application, pre-trial motions may increase as parties attempt to challenge the requirements, which in turn will lengthen district court trials and waste judicial resources.[225]

In the current economic crisis, no state court can afford to waste judicial resources, especially Nevada.[226] Nevada is one of only ten states that do not have a state intermediate appellate court.[227] Amazingly, Nevada has the highest population of any state without an intermediate state court.[228] Only the Supreme Court of Nevada has the jurisdiction to hear appeals from district courts, and both levels of Nevada courts have recently seen a tremendous increase in filings.[229] The number of district court judges continues to increase, while the size of the Supreme Court of Nevada remains at seven justices.[230] With one of the highest caseloads in the country, the Supreme Court of Nevada handles nearly two thousand new filings a year and two to three times the caseload amount of many other state high courts.[231] With the Supreme Court of Nevada handling such a heavy caseload under an abuse of discretion standard,

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[222] Welch, *supra* note 21, at 1093 (quoting United States v. Brown, 415 F.3d 1257, 1266 (11th Cir. 2005), *cert. denied*, 547 U.S. 1023 (2006)) (internal quotation marks omitted).

[223] *Id.*

[224] *See* White, *supra* note 2, at 32 (discussing Nevada's non-adoption of *Daubert* having the potential to conserve judicial resources and avoid trying the causation portion of a case twice).

[225] *See id.*

[226] During a joint session of the Nevada Senate and Assembly, Michael Douglas, Chief Justice of the Supreme Court of Nevada, expressed that the Court would continue to "do more with less." Geoff Dornan, *Douglas Touts Virtues of Specialty Courts Cut in Sandoval Budget*, NEV. APPEAL, Mar. 8, 2011 (internal quotation marks omitted), http://www.nevadaappeal.com/article/20110308/NEWS/110309691. Douglas went on to explain that, like other branches of the government, courts have made tough choices when balancing their budget. *Id.* The Supreme Court of Nevada's newest proposed budget is "16.87 percent or $2.36 million less than the current budget." *Id.* Douglas emphasized that Nevada state courts "understand Nevada is at crossroads." *Id.* (internal quotation marks omitted).

[227] *See* Tami D. Cowden, *A Nevada Court of Appeals: The Time Has Come*, COMMUNIQUÉ, Oct. 2010, at 22, 22, *available at* http://www.clarkcountybar.org/index.php.

[228] *Id.* at 23. Among states without an intermediate court, Nevada and West Virginia are the only states that do not rank "in the bottom fifth of the states in terms of population." *Id.*

[229] *Id.* at 22.

[230] *Id.*

[231] *Id.*

district court judges will likely get only one shot at a proper ruling and must have a consistent expert admissibility standard to work with.

B. Achieving a Workable Framework Within NRS 50.275

There is no better place than NRS 50.275 to incorporate the Supreme Court of Nevada's objectives as set out in *Higgs*. *Higgs* noted that NRS 50.275 differs from FRE 702 in its level of discretion.[232] The language in NRS 50.275 states: "If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge."[233]

FRE 702 contains nearly identical information but has some slight differences and includes additional conditions:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by ~~special~~ knowledge, skill, experience, training, or education, may testify ~~to matters within~~ *thereto in* the ~~scope~~ *form* of ~~such knowledge~~ *an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.*[234]

The language in NRS 50.275 should mirror the Supreme Court of Nevada's objectives in *Higgs*. If Nevada judges must focus on three overarching requirements, those requirements cannot remain buried in a state law that so closely resembles FRE 702 when *Higgs* held the *Daubert* standard persuasive only in its approach to flexibility.[235] Just as North Dakota has held strong to its own standard giving more discretion to juries,[236] Nevada should take action that truly separates itself from the rigid federal standard *Higgs* condemns.[237]

The Nevada Legislature could amend NRS 50.275 to include additional considerations set out in *Higgs*, just as the FRE did following *Daubert*.[238] Such an action would be similar to Missouri's action in adding its own additional language to MRS 490.065 after the Supreme Court of Missouri found other factors critical to its own expert witness standard.[239] Nevada too can be fluid in its statutory construction and can adjust to recent development in case law.

The Nevada standard would have increased clarity if the Legislature adds additional conditions to NRS 50.275 that give guidance regarding the relative weight to each of the overarching requirements and the factors within. The Nevada Revised Statutes can provide a framework that will result in more consistent and predictable application. For example, the Nevada Legislature could amend NRS 50.275 to read:

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232 Higgs v. State, 222 P.3d 648, 659 (Nev. 2010).
233 NEV. REV. STAT. § 50.275 (2009).
234 Braster, *supra* note 180, at 30 (italicized text (the additional conditions in FRE 702) and marked text displays the differences between NRS 50.275 and FRE 702); *see* FED. R. EVID. 702.
235 *Higgs*, 222 P.3d at 657.
236 *See supra*, Part II.C.
237 *See Higgs*, 222 P.3d at 657.
238 *Id.* at 659.
239 *See* Murphy & McFerron, *supra* note 78, at 86–87.

> Judges will assess the equally weighted requirements: (1) qualification, (2) assistance, and (3) limited scope based primarily on legal principles and apply relevant factors concerning each requirement flexibly in neither a non-determinative nor a rigid fashion. Discretion must stay within the parameters of this statute, and an expert witness must meet all three overarching requirements to the certainty of a reasonable gatekeeper.

While far from perfect, such additional conditions and language along these lines would incorporate many of the Court's objectives from *Higgs*, while providing guidance to make the standard's application more consistent and predictable.[240] An amended NRS 50.275 that included more definite factors would be better than the current vague standard.[241] *Higgs* made clear that Nevada wanted to separate and differentiate itself from *Daubert* and the federal standard; Nevada must do more than just discuss change. If the overarching *Higgs* requirements must each be met and if courts weighed them equally, practitioners would have greater certainty regarding the importance of a particular expert witness's testimony, which would lead to more consistent and straightforward evidentiary motions. The key reason for these changes is that unstructured ad hoc balancing tests are difficult for anyone to apply well, even judges, and a more clarified standard would be likely to "produce more consistent outcomes with less effort and little loss in accuracy" within Nevada cases.[242]

V. Conclusion

No one has suggested that finding a balance of consistency and flexibility in expert witness admissibility while maintaining notions of due process and efficiency will ever be easy. Expert witness standards will continue to be the topic of debate and commentary within federal and state court systems for years to come. There will always be room for improvement anytime judges have discretion to influence a trial by admitting expert testimony.[243] Each jurisdiction has its own objectives when it comes to this enigma.

The Supreme Court of Nevada in *Higgs* re-affirmed the law regarding the admissibility of expert witness testimony.[244] In declining to adopt *Daubert*, the

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[240] There are many people who will always meet proposals for change with a degree of criticism and/or skepticism, especially when dealing with well-established evidentiary standards. In the federal context, commentators and scholars alike have offered an extremely wide range of suggested alternatives to the current admissibility standards. Examples include, "educating law students and judges on science issues; forming collaborations between scientific and legal institutions; using court-appointed science experts in judicial proceedings; . . . reforming forensic science practices themselves;" and even having the Court decide admissibility solely on relevancy while repealing FRE 702 or similar state laws. Note, *Admitting Doubt*, *supra* note 6, at 2033–34 (footnotes omitted). Others have recommended a taxonomy approach that treats particular forms of expertise differently with categorizations further refined through common law development. Note, *Reliable Evaluation*, *supra* note 26, at 2163.

[241] *See* Kaye, *supra* note 15, at 1944.

[242] *Id.* (citing the following as examples reinforcing such a principle: Richard A. Epstein, *The Risks of Risk/Utility*, 48 Ohio St. L.J. 469 (1987); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992); Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 Or. L. Rev. 23 (2000)).

[243] *See* Stempel, *supra* note 4, at 11 (discussing the importance of expert testimony).

[244] Higgs v. State, 222 P.3d 648, 659 (Nev. 2010).

Court sought to prevent future courts from rigidly applying a list of enumerated factors.[245] The Court was concerned with maintaining wide discretion in which judges base their inquiry upon legal rather than scientific principles, while avoiding the downfalls of *Daubert*.[246] However, the Court's focus on these two goals obscures the standard's true impacts, which may result in inconsistent and unpredictable application. Therefore, the Supreme Court of Nevada should further clarify the admissibility standard to provide district court judges with more specific guidance in its application.[247] Moreover, the Nevada Legislature should consider incorporating a framework into NRS 50.275 through the addition of conditions that mirror the Court's concerns in *Higgs*. Only when NRS 50.275 incorporates *Higgs*'s qualification, assistance, and limited scope requirements[248] into its language can the statute truly serve as the state's "blueprint."[249]

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[245] *Id.* at 657; Braster, *supra* note 180, at 30.

[246] *Higgs*, 222 P.3d at 659.

[247] For a recent example of the Supreme Court of Nevada's application of its expert witness standard concerning a consolidated writ petition, see Williams v. Eight Judicial Dist. Court, 262 P.3d 360, 369 (Nev. 2011). In *Williams*, writ petitions arose out of two separate actions concerning the Hepatitis C outbreak at the Endoscopy Center of Southern Nevada ("ECSN"). *Id.* at 363. In both cases, the plaintiffs sued the defendants "for strict products liability including design defect, failure to warn, and breach of implied warranty of fitness for a particular purpose." *Id.* Further, plaintiffs alleged that ECSN medical personnel "injected needles contaminated with hepatitis into vials of Propofol." *Id.* Allegedly, in re-using the vials, the personnel injected plaintiffs with the now contaminated Propofol. *Id.* The defendants obtained multiple experts to rebut these claims including a registered nurse and a professor of medicine. *Id.* Both experts opined that the clinic's improper cleaning and disinfection techniques may have caused the plaintiffs contraction of hepatitis C, yet neither expert attributed a particular piece of equipment to hepatitis C transmittal. *Id.* Concerning the nurse's testimony, when faced with motions in limine, the district courts came to different conclusions concerning admissibility. *Id.* Opposite admissibility results involving the same expert in nearly identical cases exemplifies the true potential for district courts' unpredictable and inconsistent application of Nevada's current expert witness standard. The Supreme Court of Nevada ultimately held that the nurse "may testify within his area of expertise," but because he did not possess the requisite qualification, "he may not testify as to medical causation." *Id.* at 369–70.

[248] *Higgs*, 222 P.3d. at 658.

[249] *See id.* (re-affirming that NRS 50.275 is the "blueprint" for the admissibility of expert witnesses in Nevada).