

**REPORT OF THE JUDICIAL COUNCIL
CIVIL CODE ADVISORY COMMITTEE ON
KUHN V. SANDOZ PHARMACEUTICALS CORP.
AND “PURE OPINION” TESTIMONY**

February 15, 2006

BACKGROUND

In November, 2005, Senator John Vratil requested that the Judicial Council study and report on the Kansas Supreme Court’s decision in *Kuhn v. Sandoz Pharmaceuticals Corp.*, 270 Kan. 443 (2000). A copy of the case is attached to this report. The interim Special Committee on the Judiciary received testimony in November, 2005, asserting that the *Kuhn* decision altered the *Frye* test to allow the admission of “pure opinion” testimony, and the Committee requested the Judicial Council’s opinion as to whether the case should be statutorily overruled. At its December 2, 2005 meeting, the Judicial Council assigned the study to the Civil Code Advisory Committee. The Committee met on January 6, 2006 to consider the question presented.

COMMITTEE MEMBERSHIP

The members of the Judicial Council Civil Code Advisory Committee are:

J. Nick Badgerow, Chairman, practicing attorney in Overland Park and member of the Kansas Judicial Council

Hon. Terry L. Bullock, District Court Judge in 3rd Judicial District, Topeka

Prof. Robert C. Casad, Professor Emeritus, The University of Kansas School of Law, Lawrence

Hon. Robert E. Davis, Kansas Supreme Court Justice, Topeka

Hon. Jerry G. Elliott, Kansas Court of Appeals Judge, Topeka

Hon. Bruce T. Gatterman, Chief Judge in 24th Judicial District, Larned

Barry R. Grissom, practicing attorney, Overland Park

Joseph W. Jeter, practicing attorney in Hays and member of the Kansas Judicial Council

David M. Rapp, practicing attorney, Wichita

Donald W. Vasos, practicing attorney, Fairway

Bruce Ward, practicing attorney, Wichita

INTRODUCTION

A brief explanation of the nature of the *Kuhn* case and the trial court’s decision are helpful to understanding the Supreme Court’s decision and are set forth briefly below.

The case involved wrongful death and survivor claims alleging product liability and negligence. The plaintiffs contended that Jennifer Kuhn’s ingestion of the drug Parlodel, given about 10 hours after childbirth to prevent postpartum lactation, caused or contributed to her death. Within hours of being given a dose of Parlodel, which was manufactured by defendant Sandoz, Ms. Kuhn suffered a respiratory arrest and lapsed into a coma. She was proclaimed dead three days later.

The district court granted defendant's motion for summary judgment after ruling that the plaintiffs' expert witness reports failed the *Frye* test, which requires that before expert scientific opinion may be received into evidence, the basis of the opinion must be shown to be generally accepted as reliable within the expert's particular scientific field. *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923). The *Frye* test has been adopted as appropriate by the Kansas Supreme Court. *State v. Lowry*, 163 Kan. 622, 629, 185 P.2d 147 (1947). The district court ruled that the experts' opinions failed to prove both general causation (relationship between Parlodel and cerebral edema) and specific causation (relationship between Parlodel and Ms. Kuhn's death). The plaintiffs' subsequent appeal was transferred on a Supreme Court order from the Court of Appeals to the Supreme Court.

The Kansas Supreme Court ruled that the trial court had erred in applying the *Frye* test to the experts' opinions regarding causation.

"We use the term 'pure opinion' to characterize an expert opinion developed from inductive reasoning based on the expert's own experience, observation, or research. See, *Florida Power & Light Co.*, 729 So.2d at 997. The *Frye* test does not apply to pure opinion testimony. The *Frye* test does apply when an expert witness reaches a conclusion by deduction from applying a new or novel scientific principal, formula, or procedure developed by others." 270 Kan. At 456-457.

"The nature of the testimony of [plaintiffs' experts] differs from scientific evidence that is usually subject to the *Frye* test. Plaintiffs' expert testimony here is distinguished from expert testimony where a scientific principal, device, test, or procedure, developed by another, is employed that purports to offer a definitive conclusion as to causation. The weight of the expert opinions here will not hinge on the validity of a scientific principal, device, test, or procedure developed by another. Weight will depend on the accuracy of observation, the extent of training, and the reliability of the experts' interpretations." 270 Kan. at 461-462.

COMMITTEE FINDINGS

The Civil Code Advisory Committee reviewed the *Kuhn* opinion. In addition, the Committee reviewed case law prior to the 2000 *Kuhn* decision, and cases that have been decided since that opinion was handed down. The Committee concluded that *Kuhn* is consistent with Kansas law and has not changed the law in Kansas regarding admissibility of expert opinion testimony. The Committee was unanimous in its opinion that no legislative action is necessary in response to this case. The following are the Committee's findings which serve as a basis for its recommendation.

1. The admissibility of expert testimony is governed by K.S.A. 60-456(b), with the *Frye* test acting as a qualification to the statutory standard.

K.S.A. § 60-456 governs whether an expert will be allowed to provide opinion testimony. That statute, which has not been amended since it was enacted in 1964, provides as follows:

60-456. Testimony in form of opinion.

(a) If the witness is not testifying as an expert his or her testimony in the form of opinions or inferences is limited to such opinions or inferences as the judge finds (a) may be rationally based on the perception of the witness and (b) are helpful to a clearer understanding of his or her testimony.

(b) If the witness is testifying as an expert, testimony of the witness in the form of opinions or inferences is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness.

(c) Unless the judge excludes the testimony he or she shall be deemed to have made the finding requisite to its admission.

(d) Testimony in the form of opinions or inferences otherwise admissible under this article is not objectionable because it embraces the ultimate issue or issues to be decided by the trier of fact.

K.S.A. § 60-456(b) has been judicially interpreted, resulting in standards of admission that Kansas courts use to determine admissibility of expert opinion testimony:

For a witness to testify as an expert on a particular subject, the witness must have skill or experience in the business or profession to which the subject relates. *Choo-E-Flakes, Inc. v. Good*, 224 Kan. 417, 419, 580 P.2d 888 (1978).

Expert opinion testimony is admissible if it will be of special help to the jury on technical subjects with which the jury is not familiar or if such testimony will assist the jury in arriving at a reasonable factual conclusion from the evidence. *Marshall v. Mayflower Transit, Inc.*, 249 Kan. 620, Syl. ¶ 6, 822 P.2d 591 (1991).

The expert must be qualified to impart to the jury knowledge within the scope of the expert's special skill and experience that is otherwise unavailable to the jury from other sources. *State v. Tran*, 252 Kan. 494, 502, 847 P.2d 680 (1993).

Although an expert may give an opinion on an ultimate issue as provided in K.S.A. 60-456(d), such witness may do so only insofar as the witness aids the jury in the interpretation of technical facts or assists the jury in understanding the material in evidence. An expert witness may not pass on the weight or credibility of evidence, for those matters are strictly within the province of the jury. *State v. Arrington*, 251 Kan. 747, 752, 840 P.2d 477 (1992).

In addition to the statutory standards, admission of expert testimony which is allegedly formulated using “new” scientific principles, formulas, or procedures, requires satisfaction of the *Frye* test. The *Frye* test originated in the Court of Appeals for the D.C. Circuit in 1923 when James Alphonzo Frye appealed his conviction for second degree murder. *Frye v. United States*, 293 F. 1013 (D.C.Cir. 1923). The lower court had not allowed the defendant’s expert witness to testify regarding the results of a “systolic blood pressure deception test,” which was an early lie detector test based on blood pressure readings. The appellate court affirmed the exclusion of this expert testimony, stating:

“ . . . while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.” *Frye*, 293 F. at 1014.

The *Frye* test of “general acceptance” to determine the admissibility of scientific expert testimony was adopted by the Kansas Supreme Court in *State v. Lowry*, 163 Kan. 622, 629, 185 P.2d 147 (1947). Under *Frye*, any scientific or technical method, procedure, theory or formula used by an expert must be generally accepted within its relevant field. “If a new scientific technique's validity generally has not been accepted as reliable or is only regarded as an experimental technique, then expert testimony based on its results should not be admitted into evidence.” *State v. Shively*, 268 Kan. 573, 576, 999 P.2d 952 (2000).

2. The only thing new in the *Kuhn* decision is the Court’s use of the term “pure opinion” to describe the type of expert opinion testimony, admissible under K.S.A. 60-246(b), that is derived solely from the expert witness’ training and/or experience.

Kansas courts have long recognized that many expert opinions are generated solely on the basis of training, experience, or education, rather than a specific application of some particular theory or technique. The *Kuhn* opinion did not create this distinction, but rather attempted to clarify it, adopting for the first time the term “pure opinion” testimony as used by a Florida appellate court in *Florida Power & Light Co. v. Tursi*, 729 So.2d 995, 997 (Fla. Dist.App. 1999).

We use the term "pure opinion" to characterize an expert opinion developed from inductive reasoning based on the expert's own experience, observation, or research. . . . the *Frye* test does not apply to pure opinion testimony. The *Frye* test does apply when an expert witness reaches a conclusion by deduction from applying a new or novel scientific principle, formula, or procedure developed by others. The validity of pure opinion is tested by cross-examination of the witness. The validity of an opinion subject to *Frye* is tested by inquiring into general acceptance as reliable within the expert's particular scientific field. *Kuhn*, 270 Kan. at 456-57.

Although the term “pure opinion” is new to Kansas case law, such testimony has long been admissible in Kansas over a broad spectrum of cases, including criminal matters, and civil injury cases, estate contests, and worker’s compensation actions. Independent of *Frye*, opinions have long been held to be statutorily admissible if they fall “within the scope of the special knowledge, skill, experience or training possessed by the witness.” See e.g., *Boeing Military Airplane Co. v. Enloe*, 13 Kan.App.2d 128, 131, 764 P.2d 462 (1989) (“Doctors commonly rely on reports furnished by other doctors in arriving at their own diagnoses. The Fund's interpretation of K.S.A. 44-519 would require each of these other doctors to testify. This would set a standard more stringent than the one which governs admissibility of expert opinions in civil trials.”); *State v. Hayes*, 239 Kan. 443, 444, 720 P.2d 1049 (1986) (During its case the defense called Dr. Frederick C. Baker, a pathologist. Dr. Baker testified as to his experience in the examination of women who allegedly had been sexually assaulted. The doctor testified that, in his opinion, any time there is forcible rape or forcible anal sodomy, it will be accompanied by trauma, such as bruising, tearing or scratching to the vaginal or rectal area or walls of the victim.”); *In re Bernatzki's Estate*, 204 Kan. 131, 138, 460 P.2d 527 (1969) (“Of the twenty-two persons who testified in this case, including medical doctors, only two testified that in their opinion Joe Bernatzki was incompetent at the time he executed his last will and testament. These two witnesses were medical doctors. . .”); *Williams v. Benefit Trust Life Ins. Co.*, 195 Kan. 579, 582, 408 P.2d 631 (1965) (“In answer to a hypothetical question the doctor testified that in his opinion, based upon a reasonable medical certainty, the fall was the precipitating cause of plaintiff's present disability.”); *Williams v. Hendrickson*, 189 Kan. 673, 675, 371 P.2d 188 (1962) (“The doctor further testified that he observed the odor of alcohol on defendant's breath, noted that he was unsteady, his speech was slurred, and it was the doctor's opinion that defendant was under the influence of alcohol.”); *Kurdziel v. Van Es*, 180 Kan. 627, 629-306 P.2d 159 (1957) (“Two doctors testified that in their opinion the child had been electrocuted.”); *Silvers v. Wakefield*, 176 Kan. 259, 262, 270 P.2d 259 (1954) (“Both doctors testified that in their opinion the exertion of cranking the motor could have caused and resulted in the physical condition in which they found the decedent the night of his admission to the hospital, and that the exertion expended in cranking and starting such motor was sufficient to precipitate, or result in the rupture or perforation of an ulcer and coronary occlusion.”); *Lechleitner v. Cummings*, 152 P.2d 843, 846 (Kan. 1944) (“The objection was that the question called for “speculation and the conclusion of the witness.” To be sure the answer was the doctor's conclusion, that is, his opinion as to the cause of death. It was based upon his examination and the autopsy he personally had performed. Manifestly the answer was not objectionable upon the ground it constituted a conclusion. Nor was the doctor's testimony speculative. It was his positive opinion.”); *In re Boyce's Estate*, 155 Kan. 549, 553, 127 P.2d 424 (1942) (“Based on the two visits and my conversations with her on both occasions, I am definitely of the opinion that she was feeble in both mind and body and that the infirmities of old age had caused her to lack testamentary capacity.”); *Son v. Eagle-Picher Mining & Smelting Co.*, 144 Kan. 146, 150, 58 P.2d 44 (1936) (“[The doctor’s testimony] was positive opinion evidence, and that is all that is or should be required.”).

The Kansas Supreme Court in *Kuhn* noted that the nature of the testimony of plaintiffs’ experts differs from the type of scientific evidence that is subject to the *Frye* test.

“Plaintiffs’ expert testimony here is distinguished from expert testimony where a scientific principal, device, test, or procedure developed by another, is employed that purports to offer a definitive conclusion as to causation. The weight of the expert opinions here will not hinge on the validity of a scientific principal, device, test, or procedure developed by another. Weight will depend on the accuracy of observation, the extent of training, and the reliability of the experts’ interpretations.” 270 Kan. at 461-62.

Expert opinion testimony is admissible if it meets the requirements of K.S.A. 60-456. The *Frye* test is not triggered unless the opinion is based on some scientific principal, device, test or procedure that must be shown to have “general acceptance” within its relevant field. Although the *Kuhn* court introduced the new term “pure opinion” to describe expert opinion testimony that is derived solely from the expert’s experience and/or training, the *Kuhn* opinion does not represent a departure from established Kansas law.

3. The *Kuhn* decision has not resulted in any change in practice or interpretation of the *Frye* test for admissibility of expert opinions.

No Committee member is aware of any change in practice that had arisen as a result of the *Kuhn* opinion. Nor is any Committee member aware of any change in the rules governing the admissibility of expert opinions as a result of the *Kuhn* opinion.

Review of Kansas appellate decisions issued subsequent to *Kuhn* found relatively few appeals with issues regarding admission of expert testimony. Only a limited number of those cases involved application of the *Frye* test, and only four cases post-*Kuhn* have mentioned “pure opinion” testimony. Those cases involved admission of experts in civil and criminal actions, as witnesses for both plaintiffs and defendants.¹ There is no indication that *Kuhn*’s holdings on expert testimony have become the source of new or different practices with regard to Kansas rules of evidence, nor is there any indication *Kuhn* has impaired any court’s discretion to admit or exclude expert testimony. *Kuhn* does not appear to have influenced filings of claims asserting new or novel causation issues which implicate *Frye* concerns.

¹ *State v. Patton*, 280 Kan. 146, 120 P.3d 760, 785 (2005) (FBI agent’s testimony that physical evidence at the crime scene indicated certain characteristics of the offense was pure opinion testimony not subject to the *Frye* test).

Expert testimony meeting the “pure opinion testimony” definition for admission was found to have been properly excluded for unrelated policy reasons in *State v. Price*, 30 Kan. App.2d 569, 579 43 P.2d 870 (2002) (*case reversed on other grounds*).

In *Maxwell v. Wilshire Ins. Co.*, No. 91,332, unpublished opinion filed February 18, 2005, 106 P.3d 99 (Kan. App. 2005), the *Kuhn* ruling and the “pure opinion” distinction was cited as basis to approve admission at trial of testimony on behalf of both plaintiff and defendant regarding the relevance and materiality of automobile skid marks near an accident scene. “We use the term “pure opinion” to characterize an expert opinion developed from inductive reasoning based on the expert’s own experience, observation, or research. The validity of pure opinion is tested by cross-examination of the witness.” *Id.*, (holding “testimony regarding the skid marks was neither irrelevant nor unduly prejudicial, and any issues with the testimony were ably addressed on cross- examination.”)

In *State v. Foiles*, No. 88,423, unpublished opinion filed August 8, 2003 (Kan.App 2003), *Kuhn* was cited on appeal in the prosecution’s argument that expert testimony had been properly admitted into evidence. The State argued its expert witness testimony was admissible as the type of “pure opinion” identified in *Kuhn*. The Court of Appeals disagreed, stating the opinion evidence separately failed to meet the requirements of expert testimony (pure speculation and not based on any studies or personal observations).

COMMITTEE RECOMMENDATION

Based on the foregoing, the Judicial Council Civil Code Committee unanimously recommends that no legislative action be taken in response to the opinion rendered in *Kuhn v. Sandoz Pharmaceuticals Corp.*, 270 Kan. 443, 14 P.3d 1170 (2000).