**UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF WASHINGTON**

**GARY L. WOLFSTONE**
Plaintiff
v.
**Allfarm Insurance Company**
Defendant.

Civil Action No. 25-_____
Judge _____

# MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION IN LIMINE

Gary L. Wolfstone has filed a motion with this Court to make a pre-trial ruling that Dr. [REDACTED]'s opinion testimony, *i.e.*, the defense medical expert witness's testimony concerning the cause of plaintiff's injury, is inadmissible. Gary L. Wolfstone has co-extensively filed a motion for partial Summary Judgment.

Gary L. Wolfstone has filed a motion with this Court to make a further ruling that Dr.

[REDACTED]'s testimony, the defense medical expert witness's testimony in this case, has failed to meet the standards of the *Frye-Daubert* test. Hence, Wolfstone is asking for a partial Summary Judgment in this case.

Accordingly, the Court shall review and take into account the applicable Federal Rules of Civil Procedure and Federal Rules of Evidence in deciding this Motion for partial Summary Judgment and Motion in Limine in addition to the law of the *Frye-Daubert* test.

## II. LEGAL STANDARDS

### A. Federal Rule of Civil Procedure 12(b)(1)

"'Federal courts are courts of limited jurisdiction,' possessing 'only that power authorized by the Constitution and statute." *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Absent subject-matter jurisdiction over a case, the court must dismiss it. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506-07 (2006) (citing *Kontrick v. Ryan*, 540 U.S. 443, 455 (2004); Fed. R. Civ. P. 12(h)(3). By ruling that the defense medical witness's testimony is inadmissible, this Court gives up subject matter

jurisdiction over the defendant's arguments, theories, and proposed testimony of defense medical expert witnesses. Accordingly, the only remaining unresolved medical or damages issue for a jury trial or bench trial is to determine the nature and extent of plaintiff's injuries and to award damages in the appropriate amount, assuming liability has been established.

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), the plaintiff bears the burden of demonstrating the court's subject-matter jurisdiction over the claim at issue. *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). When reviewing such a motion, the court must "assume that the complaint states a valid legal claim," *Huron v. Cobert*, 809 F.3d 1274, 1278 (D.C. Cir. 2016), and "accept the well-pleaded factual allegations as true and draw all reasonable inferences from those allegations in the plaintiff's favor," *Kareem v. Haspel*, 986 F.3d 859, 865 (D.C. Cir. 2021) (quoting *Arpaio*, 797F.3d at 19). The court may also "consider materials outside the pleadings to determine [its]jurisdiction." *Id.* at 856 n.7; *see also West v. Lynch*, 845 F.3d 1228, 1231 (D.C. Cir. 2017) ("As necessary, [a court may] cull additional facts from other parts of the record.") citing *Settles v. U.S.*

*Parole Comm'n*, 429 F.3d 1098, 1107 (D.C. Cir. 2005).

## B. Federal Rules of Civil Procedure 8 and 12(b)(6)

Rule 8(a) of the Federal Rules of Civil Procedure requires that a complaint contain a short and plain statement of the grounds upon which the court's jurisdiction depends, a short and plain statement of the claim showing that the pleader is entitled to relief, and a demand for judgment for the relief the pleader seeks. Fed. R. Civ. P. 8(a). This rule "does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted). In addition, Rule 8(d) states that "[e]ach allegation must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1).

"Taken together, [those provisions] underscore the emphasis placed on clarity and brevity by the federal pleading rules, and to "give the defendants fair notice of what the claim is and the grounds upon which it rests," *Jones v. Kirchner*, 835 F.3d 74, 79 (D.C. Cir. 2016). The purposes of Rule8(a)(2) and Rule 12(b)(6) overlap, but dismissal is proper under

Rule 8 when the complaint is "so confused, ambiguous, vague, or otherwise unintelligible" that a defendant cannot discern the plaintiff's claims. *Ciralsky*, 355 F.3d at 670.

To survive a Rule 12(b)(6) motion to dismiss, the "complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

A facially plausible claim pleads facts that are not "'merely consistent with' a defendant's liability" but "that allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Twombly*, 550 U.S. at 556-57). In deciding a motion under Rule 12(b)(6), a court must accept all factual allegations as true, "even if doubtful in fact," *Twombly*, 550 U.S. at 555, and "construe the complaint 'in favor of the plaintiff,'" *Langeman v. Garland*, 88 F.4th 289, 294 (D.C. Cir. 2023) (quoting *Hettinga v. United States*, 677 F.3d 471, 476 (D.C. Cir. 2012). Courts, however, "need not accept inferences . . . not supported by the facts set out in the complaint, nor must the court accept legal conclusions." *Id.* (quoting *Hettinga*, 677 F.4th at 476). In determining whether a complaint fails to

state a claim, a court may consider only the facts alleged in the complaint and "any documents either attached to or incorporated in the complaint," as well as "matters of which the court may take judicial notice." *N Am. Butterfly Ass'n v. Wolf*, 977 F.3d 1244, 1249 (D.C. Cir. 2020) (alterations in original accepted, citation omitted).

## C. Federal Rule of Civil Procedure: Summary Judgment

Summary Judgment or partial Summary Judgment shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Facts are only "'material' if a dispute over it might affect the outcome of a suit under the governing law," meaning that "factual disputes that are 'irrelevant or unnecessary' do not affect the summary judgment determination." *Mayorga v. Merdon*, 928 F.3d 84, 89 (D.C. Cir. 2019) (quoting *Holcomb v. Powell*, 433 F.3d 889, 895 (D.C. Cir. 2006) (quoting *Anderson v. Liberty* 29 *Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is only "genuine" if "the evidence is such that a reasonablejury could return a verdict for the non-moving party." *Id.*

Thus, “[i]n considering a motion for summary judgment, judges must ask themselves not whether they think ‘the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented,’ because that evidence is such that “the jury could reasonably find for the plaintiff.” *Stoe v. Barr*, 960 F.3d 627, 638-39 (D.C. Cir. 2020) (quoting *Anderson*, 477 U.S. at 252).

## III. DISCUSSION
### The *Frye-Daubert* Test

Legal historians trace the use of scientific expert testimony back to the sixteenth century. *Buckley v. Rice Thomas* (1554) 75 *Eng. Rep.* 182; *Plowd* 118. The present day standard for the admissibility of scientific evidence stems from *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

*Frye v. United States*, was decided by the Court of Appeals for the District of Columbia Circuit. James Frye pled not guilty to an accusation of murder. His lawyers offered psychologist William Marston as an expert witness who had developed an assessment that measured fluctuations in systolic blood pressure — what some might characterize as

a type of lie detector test — that could prove Frye's innocence.

At this time, no special rules existed regarding the admissibility of scientific evidence, with the only criteria being whether the evidence was relevant, whether it was helpful, and whether the witness had appropriate qualifications.

The *Frye* court put forward a new standard: "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. This "general acceptance" standard that focuses on the extent to which an expert's ideas have been established within the scientific community fashioned for judges a "gatekeeping" function.

The *Frye* standard remained dominant for several decades until 1975, when the Federal Rules of Evidence (FRE) were codified. See Kenneth J. Weiss et al., Analysis and Commentary, Frye's Backstory: A Tale of Murder, a Retracted Confession, and Scientific Hubris, 42 J. AM. ACAD. PSYCHIATRY & L. 226 (2014). The dearth of citations to *Frye* during the 1960s does not mean

that courts ignored it because some courts adopted the general acceptance test without citing *Frye*.

"*Frye* applied only to novel scientific techniques . . . [and] few courts considered the types of expert scientific evidence presented in a typical civil case . . . to be based on a novel scientific technique within the meaning of the *Frye* rule; and] . . . most state court opinions, particularly at the trial court level, are unpublished". Bennett Capers, Race, Gatekeeping, Magical Words, and the Rules of Evidence, 76 VAND. L. REV. 1855, 1862–63 (2023) (footnote omitted).

Rule 702 became part of a growing conversation, as the role of courts in applying *Frye* expanded from criminal prosecutions to civil proceedings. This is the context in which the Supreme Court heard *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, a case concerning whether a drug to treat nausea that was taken by pregnant women caused birth defects. The evidence from plaintiffs' expert witness did not meet *Frye's* generally accepted standard, and the trial judge granted summary judgment to the defendants, which was affirmed on appeal.The plaintiffs appealed to the Supreme Court, arguing that the *Frye* standard no longer applied after the adoption of Rule 702.

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995), 153 522 U.S. 136 (1997), 154 526 U.S. 137 (1999).

The Supreme Court agreed and created a new, nonexclusive framework in *Daubert* for assessing the admissibility of expert witness testimony: (1) whether the expert testimony is testable; (2) whether the expert testimony has been subjected to peer review; (3) the known or potential error rate; (4) existence of standards controlling the technique's operation; and (5) whether the opinion or practice is generally accepted within the field.

While not a rigid or exhaustive test, these guiding principles from *Daubert* solidified judges' roles as gatekeepers with regard to determining when scientific evidence can enter a legal dispute and when it should be excluded. Subsequent decisions by the Supreme Court, such as *General Electric Co. v. Joiner* and *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999) further expanded this judicial role by affirming an "abuse of discretion" standard.

FED. R. EVID. 702 (1975) (amended 2023) ("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.").

FED. R. EVID. 702 advisory committee's note to 2000 amendment (noting that *"Daubert* set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony" and then listing those factors, which include: "(1) Whether experts are 'proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying.' (2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. (3) Whether the expert has adequately accounted for obvious alternative explanations. (4) Whether the expert 'is being as careful as he would be in his regular professional work outside his paid litigation consulting.' (5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.")(citations omitted) See, *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1317 (9th Cir. 1995), 153 522 U.S. 136 (1997), 154 526 U.S. 137 (1999).

FED. R. EVID. 702 (1975) (amended 2023) (“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, standard for appellate review of trial courts’ decisions on the admissibility of expert witness testimony and extending trial judges’ gate-keeping function under the Federal Rules of Evidence to all skill-based expert testimony, not just scientists’.

In *General Electric Co. v. Joiner,* 522 U.S. 136 (1997), the Supreme Court clarified *Daubert*, holding that an appellate court may still review a trial court's decision to admit or exclude expert testimony. The standard of review for this inquiry is the abuse of discretion standard. In K*umho Tire Co. v. Carmichael* 526 U.S. 137 (1999), the Supreme Court further clarified that the *Daubert* factors may apply to non-scientific testimony, meaning "the testimony of engineers and other experts who are not scientists."

As set forth in *State v. Gregory*, 158 Wash 2nd 759 (2006): "¶114 Washington has adopted the Frye test for evaluating the admissibility of new scientific evidence. The primary goal is to determine whether the evidence offered is based on established scientific methodology. Both the scientific theory

underlying the evidence and the technique or methodology used to implement it must be generally accepted in the scientific community for evidence to be admissible under *Frye*. If there is a significant dispute among qualified scientists in the relevant scientific community, then the evidence may not be admitted, but scientific opinion need not be unanimous." (citations omitted)

The Court in *Gregory* goes on to say: "¶115 Once a methodology is accepted in the scientific community, then application of the science to a particular case is a matter of weight and admissibility under Rule 702, which allows qualified expert witnesses to testify if scientific, technical, or other specialized knowledge will assist the trier of fact. Rule 702." (citations omitted)

The guidance provided by *Daubert*, along with holdings from subsequent cases like *Kumho*, was incorporated into a 2000 Amendment to Rule 702.

The AdvisoryCommittee for the 2000 Amendment to Rule 702 noted that “the admissibility of all expert testimony is governed by the principles of Rule 104(a)[,] . . . [where] the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of

the evidence."

After the 2000 Amendment, concerns arose that courts were not consistently analyzing both "the expert's methodology" and the "application of that methodology to the facts at issue."Put simply, federal courts were not playing the gatekeeping function that the 2000 Amendment intended. To help clarify this problem, a December 2023 Amendment explicitly brought the preponderance standard from Rule 104(a) into Rule 702. Joiner, 522 U.S. at 138–39; Kumho, 526 U.S. at 147. See FED. R. EVID. 702 (2000 amendment). See advisory committee's note to 2000 amendment. David E. Bernstein & Eric G. Lasker, Defending Daubert: It's Time to Amend Federal Rule of Evidence 702 , 57 WM. & MARY L. REV. 1, 7 (2015). Bernstein and Lasker wrote in 2015 that "[f]ifteen years have passed, and it is now apparent that the 2000 amendments to Rule 702 have not succeeded in entrenching these [gatekeeping] requirements. Although many courts have faithfully applied amended Rule 702, Judge Thomas D. Schroeder writes: "To discharge this gatekeeper role, a trial court must make a preliminary determinationwhether the expert's opinion evidence meets the admissibility standards of Federal Ruleof Evidence 702, which in turn requires application of Federal Rule of Evidence

104(a)’s preponderance test. . . . [S]ome trial and appellate courts misstate and muddle the admissibility standard, suggesting that questions of the sufficiency of the expert’s basis and the reliability of the application of the expert’s method raise questions of weight that should be resolved by a jury, where they can be subject to cross-examination and competing evidence.” Thomas D. Schroeder, Toward a More Apparent Approach to Considering the Admission of Expert Testimony, 95 NOTRE DAME L. REV. 2039 (2020) (emphasis omitted).

The 2023 Amended FRE 702 states: A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that: (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert’s opinion reflects a reliable application of the principles and methods to the facts of the case. FED. R. EVID. 702 (emphasis added); see id. advisory committee’s note to 2023 amendments.

## IV. CONCLUSION

This Court should grant Gary L. Wolfstone's motion to make a pre-trial ruling that Dr. [REDACTED]'s opinion testimony, *i.e.*, the defense medical expert witness's testimony concerning the cause of plaintiff's injury, is inadmissible.

Coextensively, this Court should grant Gary L. Wolfstone's motion to make a further ruling and finding that Dr. [REDACTED], the defense medical expert witness in this case, has failed to meet the standards of the *Frye-Daubert* test. Wolfstone's motion for partial Summary Judgment should therefore be granted.

Accordingly, this Court should make a finding and ruling that the only remaining unresolved medical or damages issue for a jury trial or bench trial is to determine the nature and extent of plaintiff's injuries and to award damages in the appropriate amount, assuming liability has been established.

DATED this _____ day of _____, 2025

/s/_____
Gary L. Wolfstone, WSBA 3997