DAUBERT **ISSUES IN CONSTRUCTION LITIGATION**

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Arizona courts have long followed the standard set forth in *Frye v. United States,* 293 F. 1013 (D.C.Cir. 1923) for determining the admissibility of expert testimony. In 2010, however, the Arizona legislature passed A.R.S. § 12-2203, which adopts the federal expert witness standards arising out of *Daubert v. Merrell Dow Pharmaceuticals,* 509 U.S. 579 (1993) and, later, amended Federal Rule of Evidence 702. The legislature's intent was to greatly increase the gatekeeping role of the trial judge in determining the admissibility of expert testimony.

Since adoption, § 12-2203 has faced a rough start. It has been subject to numerous constitutional challenges in the trial courts.[1] More recently, on January 12, 2011, the court of appeals accepted special action jurisdiction in a criminal case and held the statute unduly infringed on the supreme court's rulemaking power. Still, because the Ad Hoc Committee on the Rules of Evidence appointed by the supreme court is currently deliberating on whether to adopt the revised Federal Rule 702, and because the federal standard applies in federal actions, familiarity with *Daubert* and its progeny appears necessary.

[1] Attached to this paper are several trial court decisions, with the courts roughly splitting evenly on the constitutional issue.

This paper will address how the *Daubert* standard raises the bar for having expert testimony, especially with respect to the types of issues normally raised in construction litigation.

A. THE CURRENT STANDARD.

Under current Rule 702, Ariz. R. Evid., a court's gatekeeping function is very limited. Before admitting expert opinion testimony, the court need only determine the following:

1. Whether the witness is qualified as an expert by knowledge, skill, experience, training or education; and
2. Whether the qualified expert's testimony will assist the trier of fact.

See, e.g., Logerquist v. McVey, 196 Ariz. 470, 1 P.3d 113 (2000). Potential problems with the expert's actual testimony—such as the lack of peer review, or failure to account for other causes or variables—go to the weight of the opinions to be considered by the finder of fact rather than to admissibility.

The *Frye* decision added a third admissibility factor for opinions relying on new scientific tests or techniques. In such cases, Arizona courts "require the proponent of such evidence to establish its reliability by demonstrating it has gained general acceptance and recognition in the relevant scientific community." *Mason v. Eastside Place Apartments, Inc.,* 2010 WL 2927432 (Ariz. App. 2010)(Unpublished). However, "when a witness reaches a conclusion by inductive reasoning based on his or her own experience, observation, or research," the court's role is limited merely to determining

whether (a) the witness is qualified; and (b) the testimony will aid the trier of fact. *Logerquist,* 196 Ariz. At 490, 1 P.3d at 133.

B. THE FEDERAL STANDARD UNDER *DAUBERT* AND F.R.E. 702.

In *Daubert,* the Supreme Court explained that the admissibility of expert testimony required trial courts to expand their gatekeeping functions under Rule 104(a), F.R.E., before admitting expert testimony. The court set forth a non-exclusive checklist for assessing the reliability of scientific expert testimony, including:

> (1) Whether the expert's technique or theory can be or has been tested—that is, whether the expert's theory can be challenged in an objective sense.
>
> (2) Whether the technique or theory has been subject to peer review and publication.
>
> (3) The known or potential rate of error of the technique or theory when applied.
>
> (4) The existence and maintenance of standards and controls.
>
> (5) Whether the technique or theory has been generally accepted in the scientific community.

509 U.S. at 593-94.

Six years later, the Supreme Court made clear that the *Daubert* factors applied to all expert testimony regardless of the basis of that testimony. In *Kumho Tire Co. v. Carmichael,* 526 U.S. 137 (1999), the Court held Rule 702's gatekeeping function for determining the reliability of scientific opinions also applied to expert testimony

based upon technical knowledge and experience. In that case, the proffered expert was an engineer, and his testimony regarding the cause of a tire failure was based on his numerous years of experience in the automotive and tire industry. When an expert is relying "primarily on experience, [she] must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." 2000 Advisory Cmte. Notes

In 2000, Federal Rule of Evidence 702 was amended to codify *Daubert* and *Kumho Tire.* The new provision provides:

> 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 a expert by knowledge, skill, experience, training, or education, may testify thereto in the form of 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.

Rule 702, F.R.E. The accompanying Advisory Committee Notes then identify several factors relevant to the reliability of the proffered testimony, including :

(a) Whether the 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 formed their opinions for the purposes of testifying;

(b) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion;

(c) Whether the expert has accounted for alternative explanations;

(d) Whether the expert is being as careful as he would in his regular professional work;

(e) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.

In sum, under existing Arizona principles, the court's gatekeeping function is limited to ensuring appropriate credentials and determining whether the testimony will aid the trier of fact. For testimony based on new scientific tests or techniques, Arizona courts will require the proponent demonstrate the technique has gained general acceptance and recognition in the relevant scientific community.

By contrast, the federal regime greatly expands the gatekeeping role. In addition to examining an expert's credentials and whether it will aid the jury, federal courts conduct a broad reliability inquiry, specifically reviewing the factual underpinnings of the opinion, the reliability of the methodology proposed, and the application of that methodology in the particular circumstances.

C. ARIZONA'S EFFORTS TO ADOPT THE FEDERAL STANDARDS.

After the U.S. Supreme Court decided *Daubert* and *Kumho Tire*, and amended Federal Rule of Evidence 702, the Arizona Supreme Court refused to follow suit. In *Logerquist v. McVey,* 196 Ariz. 470, 1 P.3d 113 (2000), our supreme court rejected the *Daubert* requirement that the trial judge preliminarily assess the reliability of an expert's underlying methodology and reasoning. According to the court, "[q]uestions about the accuracy and reliability of a witness' factual basis, data, and methods go to the weight and credibility of the witness' testimony and are questions of fact. The right to

jury trial does not turn on the judge's preliminary assessment of testimonial reliability." *Id.* at 470, 1P.3d at 133.

The Arizona legislature enacted § 12-2203 in May 2010. Entitled, "Admissibility of expert opinion testimony," it states:

> A. In a civil or criminal action, only a qualified witness may offer expert opinion testimony regarding scientific, technical or other specialized knowledge and the testimony is admissible if the court determines that all of the following apply:
>
> 1. The witness is qualified to offer an opinion as an expert on the subject matter based on knowledge, skill, experience, training or education.
>
> 2. The opinion will assist the trier of fact in understanding the evidence or determining a fact in issue.
>
> 3. The opinion is based on sufficient facts and data.
>
> 4. The opinion is the product of reliable principles and methods.
>
> 5. The witness reliably applies the principles and methods to the facts of the case.
>
> B. The court shall consider the following factors, if applicable, in determining whether the expert testimony is admissible pursuant to subsection A:
>
> 1. Whether the expert opinion and its basis have been or can be tested.
>
> 2. Whether the expert opinion and its basis have been subjected to peer reviewed publications.
>
> 3. The known or potential rate of error of the expert opinion and its basis.

4. The degree to which the expert opinion and its basis are generally accepted in the scientific community.

A.R.S. § 12-2203. Although laid out differently, § 12-2203 basically tracks the language of Federal Rule 702 and its advisory committee notes. Thus, the legislature's clear intent was to bring Arizona into alignment with the federal standard.

From the outset, however, § 12-2203 was subject to constitutional challenges. The primary arguments are that the statute either (a) impermissibly encroaches on the province of the jury; or (b) usurps the supreme court's rule-making authority and thereby violates the separation of powers doctrine. Attached are several decisions rendered by Arizona trial courts wrestling with the constitutionality issue. Those deciding the issue have roughly broken evenly for and against its constitutionality.

Recently, the court of appeals accepted special action jurisdiction of the issue, which was raised in a criminal proceeding involving the alleged sexual abuse of a child. *Lear v. Hon. Richard S. Fields*, 2 CA-SA 2010-0074 (Jan. 12, 2011). In that case, the State of Arizona intended to call an expert to testify about the character traits of child sexual abuse victims (namely, that victims often delay reporting the abuse and may recant truthful allegations of abuse), but the expert had no contact with and did not evaluate the victim. In response to the defendant's attempt to have the expert stricken under § 12-2203, the prosecution filed a motion to have the statute declared unconstitutional.

The court in its opinion only addressed the separation of powers argument. It noted that statutory enactments that supplement rather than conflict with court-promulgated rules are constitutional. However, when it compared the language of the

statute to the Arizona Supreme Court's interpretations of Rule 702, the court concluded "the statute does not 'supplement' the rule." *Id.* at ¶ 18. Rather, the legislature "promulgated an evidentiary rule that ascribes to trial judges the kind of broad 'gatekeeping' role the court in *Logerquist* opposed when it rejected such an interpretation of its own rule." *Id.* at ¶ 19. In other words, the statute did not clarify an evidentiary rule, but "repealed a rule of evidence." *Id.*

But this is not the end of the story. The decision will no doubt be appealed to the Arizona Supreme Court. Moreover, the supreme court has already created an Ad Hoc Committee to consider proposed changes to Arizona Rule 702 that would bring it into alignment with the Federal Rule 702. Adoption of a new Rule 702 by the supreme court would negate any separation of powers challenges.

D. *DAUBERT*-TYPE CHALLENGES IN CONSTRUCTION CASES.

Approximately half of the state jurisdictions have already adopted the federal standard. In addition, the federal courts have uniformly applied the *Daubert* gatekeeping role to the types of experts commonly used in construction litigation—namely, engineers, architects and other experts who base their opinions on a combination of education and experience—for over a decade.

In preparing this paper, I tried to review all cases with *Daubert* challenges involving construction issues, or otherwise discussed expert testimony involving engineers and architects, within the past two years. The number of such decisions was overwhelming. Most of the cases involved motions to strike expert testimony and appeared to be resolved by motion based on affidavits and written reports. However, a

sizeable minority of the cases involved full-blown "*Daubert* hearings," some of which lasted for several days. By far, the most common reason for striking expert testimony was the court's decision that it lacked sufficient reliability under the *Daubert* factors.

Below is a list of illustrative cases, broken out by subject matter of the expert testimony.

1. **Scheduling Delays/Critical Path Analysis:**

- *The Weitz Co. v. MH Washington,* __ F.3d ___ (8th Cir. Jan. 7, 2011)(Scheduling analysis admitted, though court says the analysis was "weak" because it did not identify each activity on the project as either on or off the critical path. The court held that "at some point most construction activities become critical if they are all there is left to complete on the job").

- *RLI Ins. Co. v. Indian River School District*, 2007 WL 4292109 (D. Del. 2007)(Scheduling analysis was stricken. Although the analysis "tend[ed] to prove that [contractor] was substantially behind schedule in progress as a result of delays beyond his control," it did not discuss whether these delays were on the critical path).

2. **Costs of Repairs or Extra Work:**

- *Mactec, Inc. v. Bechtel Jacobs Co., LLC,* 2009 WL 3073189 (6th Cir. 2009)(Unpublished)(non-engineer allowed to opine on subcontractor's damages caused by need to place increased contour fill;

expert relied on engineers to calculate the difference between actual fill quantities to sub's bid).

- *Wal-Mart Stores, Inc. v. Qore, Inc.,* 2009 WL 305801 (N.D. Miss. 2009)(civil engineer's calculations distinguishing the value of asphalt used to remediate a condition as opposed to value of asphalt that constituted betterment were not reliable and therefore not admitted at trial).

- *Curtis v. Wilks,* 704 F.Supp.2d 771 (N.D. Ill. 2010)(non-engineer's opinion on repair costs stricken because he did not have relevant experience to render the opinion, and his estimate did not distinguish costs to replace cosmetic elements from costs to repair the structural integrity of the building).

- *Proctor v. Fry,* 2008 WL 1970028 (Ohio App. 2008)(civil engineer allowed to testify regarding his calculations on the lineal feet of pipe necessary to extend sewer to easement).

- *RLI Ins. Co. v. Indian River School Dist.,* 2007 WL 4292109 (D. Del. 2007)(testimony of surety's expert that owner overpaid contractor was not reliable; damage calculation was not sufficiently connected to the underlying facts in the case).

3. <u>Causation of Construction-Related Failures</u>:

- *Curtis v. Wilks,* 704 F.Supp. 2d 771 (N.D. Ill. 2010)(contractor's testimony on cause of structural damage excluded

because contractor did not have structural engineering degree or experience).

- *Hoy v. DRM, Inc.,* 114 P.3d 1268 (Wyo. 2005)(civil engineers' testimony that next-door construction activities damaged his leach field found to be unreliable. Among other things, the engineers could not rule out other causes for the field's failure; could not explain how their experience led to their opinions; and could not replicate the damage with on-site tests).

- *Bailey v. Annistown Road Baptist Church, Inc.,* 689 S.E.2d 62 (Ga. App. 2010)(civil engineer allowed to testify as to cause of water intrusion).

- *Lingefelt v. Int'l Paper Co.,* __ So.3d __, 2010 WL 2797404 (Ala. App. 2010)(mechanical engineer's testimony that collapse was caused by improper weld was unreliable; engineer had never before been involved in a case with a broken weld and he did not know the condition of the weld before it failed).

- *State Farm Lloyds v. Hamilton,* 265 S.W.3d 725 (Tex. App. 2008)(expert allowed to testify that soil settled as a result of a plumbing leak; expert made the same type of inquiries and performed the same tests that the other side's expert did).

- *Meemic Ins. Co. v. Hewlett-Packard Co.,* 717 F.Supp.2d 752 (2010)(electrical engineer's testimony that fire was caused by unknown

defect in AC power adapter not reliable. Expert's premise—that fire damage to the adapter was more severe than anywhere else so it must be the cause of the fire—was "within the understanding or common knowledge of the average juror").

4. <u>Standard of Care/Negligence</u>:

- *HNTB Georgia v. Hamilton-King*, 697 S.E.2d 770 (Ga. 2010)(road construction engineer's testimony lacked reliability that failure to design bridge with emergency pull-off area in construction area breached standard of care. Engineer could not cite to such a requirement in a manual or treatise, nor had he ever designed a traffic control plan for a bridge).

- *Fedelich v. American Airlines,* 724 F.Supp. 2d 274 (D. P.R. 2010)(mechanical engineer's testimony that emergency shutoff was located negligently not reliable. Engineer only performed a photographic inspection, did not consider alternative placement locations or review past accident rates).

- *Nosal v. Granite Park LLC,* 269 F.R.D. 284 (S.D. N.Y. 2010)(architect and engineer's testimony that hotel bathtub surface was inadequate not reliable. Their only inspection came three years after accident, and there was no evidence indicating the conditions at the time of inspection were the same as at the time of the accident).

5. <u>Lost Profits</u>:

- *Parc Royale East Development, Inc. v. U.S. Project Mgt., Inc.,* 38 So.3d 865 (Fla. App. 2010)(expert's testimony that developer's breach caused lost profits of a certain amount not reliable. Expert was unable to explain his calculation methodology).

FILED
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CLERK OF SUPERIOR COURT
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BY _____ DEPUTY

IN THE SUPERIOR COURT

PINAL COUNTY, STATE OF ARIZONA

Date: 09/07/2010

THE HON BOYD T JOHNSON.
Division: 2

By Judicial Administrative Assistant Yolanda Arredondo

THE STATE OF ARIZONA, Plaintiff(s), vs. **TIMOTHY JAMES WHITEWAY** Defendant(s).	**S1100CR200901554** **RULING ON MATTER(S) UNDER ADVISEMENT**

The Court having considered the State's "Motion to Declare A.R.S. §12-2203 Unconstitutional", filed July 28, 2010; the Defendant's "Response", filed August 12, 2010; and, the arguments of counsel presented in Court on September 2, 2010; the presentation on that date being limited solely to the Court's determination of the constitutionality of the challenged statue;

The Court FINDS, as follows:

The issue presented directly to the Court is whether A.R.S. §12-2203 (Session Laws, 2010, Chapter 302; SB1189) is unconstitutional. Other issues related to the method or procedure by which the testimony of the State's proposed witness, Kristi Murphy, or any other expert witness is to be tested or weighed and, ultimately, its admissibility decided have not yet been submitted to this Court for decision. After careful consideration of the written and oral arguments presented by counsel for the parties, the Court finds that A.R.S. §12-2203 does not improperly usurp the Court's rule making authority, that it supplements rather than engulfs Arizona Rules of Evidence, Rule 702, and it is therefore not an unconstitutional statutory enactment.

Section 12-2203, which took effect in July of this year applies to "expert opinion testimony" in civil and criminal cases. Its first two requirements (A)(1) and (2), are directly taken from Rule 702. In addition to the requirement that the witness be "qualified to offer an opinion as

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an expert on the subject matter based on knowledge, skill, experience, training or education" and that "[t]he opinion will assist the trier of fact in understanding the evidence or determining a fact in issue," 12-2203 sets forth three further requirements for the admission of such testimony:

3. The opinion is based on sufficient facts and data.
4. The opinion is the product of reliable principles and methods.
5. The witness reliably applies the principles and methods to the facts of the case. § 12-2203(A).

The state argues that this statute is unconstitutional because it violates principles of separation of powers and judicial rulemaking. On its face, 12-2203 is a procedural rule, and it is clear that the power to make such rules rests with the Arizona Supreme Court. That power, however, may be shared with legislative enactments. See State ex rel. Collins v. Seidel, 142 Ariz. 587, 591, 691 P.2d 678, 682 (Ariz. 1984). Courts will recognize legislature-made rules if they are "reasonable and workable" and "supplement the rules" of the courts. *Id.* Only where the statutory procedural rule conflicts with or engulfs judicial rules will the court reject it. *Id.*

The state urges that 12-2203 conflicts with or engulfs Rule 702 because it is "mandatory" and "exclusive." Neither conclusion is apparent from the legislative text. Section 12-2203 contains two provisions that are in some sense mandatory: 12-2203(A) provides that "only a qualified witness may offer expert opinion testimony," which seems to be an unobjectionable restatement of Rules 701 and 702. 12-2203(B) requires courts to consider four factors in determining admissibility of the testimony. The statute, however, leaves to the court's discretion the determination of whether any of those four factors are "applicable" in a particular case. Subsection (A) also provides that "the [expert opinion] testimony is admissible if the court determines that" the five previously mentioned requirements apply, but it does not state that such requirements provide the *exclusive* test of admissibility or that it replaces the standard courts have developed following Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). Rather, on its face, 12-2203(A) establishes a test, passage of which is a sufficient but not necessary condition for the admission of expert testimony. Thus 12-2203 supplements Rule 702, but it does not conflict with the rule or its historical application.

The state also argues that 12-2203 is unconstitutional because, as with the evidentiary standard announced in Daubert v Merrell Dow Pharmaceuticals, Inc, 509 U.S. 579 (1993), it requires the court to invade the province of the jury by weighing the credibility of expert testimony. In Logerquist v McVey, 196 Ariz. 470, 1 P. 3rd 113 (2000), the Arizona Supreme Court rejected Daubert as a mandatory interpretation of Rule 702, reasoning in part that it would demand that judges rule on credibility by inquiring into whether the expert opinion has a reliable basis. But 12-2203 is not a clone of Daubert. The wording of the requirements it establishes appears nowhere in the Daubert opinion, and where Daubert requires the judge to perform a gatekeeping function, 12-2203 merely permits an inquiry into reliability where appropriate. Section 12-2203 requires not a hearing but only a determination, which reasonably may or may not be the result of a hearing. While a misapplication of 12-2203 by a magistrate could result in the invasive inquiry that raised the

Logerquist court's concern, a limited, reasonable application amounts to no more than a potentially useful way of applying Rule 702. The court is aware of no appellate court that has yet had the opportunity to review the constitutionality of 12-2203. This Court is required to give a presumption of constitutionality to properly enacted statutory provisions. This particular statute does not create "an analytical framework contrary" to Rule 702; its analytical framework, dispute legislative history that speaks of replacing *"Frye"* with *"Daubert"*, can be applied so as to supplement and not replace Rule 702.

If the Court finds that 12-2203 is constitutional, the state argues, the Court must also determine whether the statute is substantive in nature and, if substantive, the state argues that the statute cannot apply to a case filed before it took effect in July because it does not explicitly declare itself retroactive. There is an exception to the general prohibition on retroactivity: "a statute does not have [impermissible] retroactive effect if it is merely procedural and does not affect an earlier established substantive right." *In re Shane B.*, 198 Ariz. 85, ¶ 8, 7 P.3d 94 (Ariz. 2000) (quoting *Bouldin v. Turek*, 125 Ariz. 77, 78, 607 P.2d 954, 956 (Ariz. 1979)).

IT IS THEREFORE, ORDERED, as follows:

Denying the State's "Motion to Declare A.R.S. §12-2203 Unconstitutional".

DONE this 7th day of September, 2010.

Judge of the Superior Court

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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2007-008288-001 DT

09/23/2010

JUDGE DOUGLAS L. RAYES

CLERK OF THE COURT
H. O'Shaughnessy
Deputy

STATE OF ARIZONA

LISA MARIE MARTIN

v.

JOEL RANDU ESCALANTE-OROZCO (001)

BOBBI FALDUTO
STEPHEN J WHELIHAN
MICHAEL TERRIBILE

CAPITAL CASE MANAGER
VICTIM SERVICES DIV-CA-CCC

RULING

These consolidated matters were taken under advisement after oral argument of September 20, 2010 on the State's consolidated Motions to Declare A.R.S. 12-2203 Unconstitutional and Apply *Frye* Standard. The court has considered the State's Motions, the written Responses of Defendants Brubaker, Gukeisen, Pena, Price, Vitasek and Escalante Orozco, the oral arguments of counsel, and Memorandum to the Court submitted by Defendant Vitasek at the conclusion of the oral argument.

The Court has received a Motion of the Arizona Trial Lawyers Association for Leave to File Amicus Curiae Brief. The Amicus motion is untimely and the court does not find additional briefing necessary or useful. The Motion to File Amicus Curiae Brief is denied.

In its Motions, the State challenges the constitutionality of the recently enacted A.R.S. § 12-2203, which governs admissibility of expert opinion testimony. The State argues that the statute is unconstitutional because: (1) as a procedural enactment, it usurps the rulemaking authority of the Arizona Supreme Court and violates separation of powers;

and (2) it contradicts Article 6, § 27 of the Arizona Constitution by making the trial judge the arbiter of witness credibility.

A.R.S. § 12-2203 sets forth factors that the trial court must consider when determining whether a witness may offer expert opinion testimony:

> A. In a civil or criminal action, only a qualified witness may offer expert opinion testimony regarding scientific, technical or other specialized knowledge and the testimony is admissible if the court determines that all of the following apply:
>
> 1. The witness is qualified to offer an opinion as an expert on the subject matter based on knowledge, skill, experience, training or education.
>
> 2. The opinion will assist the trier of fact in understanding the evidence or determining a fact in issue.
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> 3. The opinion is based on sufficient facts and data.
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> 4. The opinion is the product of reliable principles and methods.
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> 5. The witness reliably applies the principles and methods to the facts of the case.
>
> B. The court shall consider the following factors, if applicable, in determining whether the expert testimony is admissible pursuant to subsection A:
>
> 1. Whether the expert opinion and its basis have been or can be tested.
>
> 2. Whether the expert opinion and its basis have been subjected to peer reviewed publications.
>
> 3. The known or potential rate of error of the expert opinion and its basis.
>
> 4. The degree to which the expert opinion and its basis are generally accepted in the scientific community.

Rule 702, Ariz.R.Evid., "Testimony by Experts," is the Rule enacted by the Arizona Supreme Court to address the admissibility of expert testimony. It reads:

> 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.

ANALYSIS:

Does A.R.S. 12-2203 conflict with Rule 702?

The Court starts with the premise that when analyzing a statute, it must, if possible, construe the statute so that it does not violate the constitution. *Readenour v. Marion Power Shovel*, 149 Ariz. 442, 445, 719 P.2d 1058, 1061 (1986).

The starting point is the determination of whether A.R.S § 12-2203 conflicts with Rule 702, or instead is a reasonable and workable supplement to the Rule. *Seisinger v. Siebel*, 220 Ariz. 85, 96, ¶42, 203 P.3d 483, 494 (2009). The Legislature may enact laws which are "reasonable and workable" and supplement rather than conflict with the rules enacted by the Arizona Supreme Court. Id. *at* 89, ¶8, 203 P.3d at 487. Thus, if the statute supplements Rule 702 rather than contradicts it, its enactment does not violate separation of powers.[1]

Here, the statute conflicts with Rule 702. The Supreme Court, in *Logerquist v. McVey*, 196 Ariz. 470, 1 P.3d 113 (2000), specifically considered and rejected the interpretation of Rule 702 that placed a "gatekeeper" function on the admissibility of purportedly scientific evidence with the trial court. The *Logerquist* decision rejected the *Daubert* requirement that the trial judge must make a preliminary assessment of whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue. The *Daubert* decision listed considerations that bear on the inquiry, including whether the theory or technique in question can be (and has been) tested, whether it has been subjected to peer review and publication, its known or potential error rate and the existence and maintenance of standards controlling its operation, and whether it has attracted widespread acceptance within a relevant scientific community.

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[1] The Court must consider Rule 702 as it is interpreted by Arizona case law. *See Collins v. Seidel, Deason, Real Party in Interest*, 142 Ariz. 587, 590-91, 691 P.2d 678, 681-82 (1984) (considering whether A.R.S. § 28-692.03(A) conflicted with "Rule 702 and cases construing the rule").

Subsection B of A.R.S. §12-2203 lists the same considerations listed in *Daubert* and requires the trial court to consider them "in determining whether the expert testimony is admissible...." As was the case in *Seisinger*, the newly-enacted statute imposes requirements in addition to those in Rule 702, as interpreted by the Arizona Supreme Court, which must be satisfied before a witness may testify. *See Seisinger*, 220 Ariz. at 90, ¶17, 203 P.3d at 488. Thus, a witness otherwise qualified to testify under Rule 702 would be precluded if he or she did not meet the further requirements of A.R.S. § 12-2203.

Defendants argue that the statute can be harmonized with Rule 702. In light of *Logerquist*'s specific rejection of the *Daubert* considerations, it is not possible to harmonize the statute with the Court's interpretation of the rule. They are in direct conflict.

Does the statute invade the province of the jury?

The State's second argument is that A.R.S. § 12-2203 violates the Arizona Constitution because it makes the trial court the arbiter of witness credibility. However, Rule 702, as well as other Rules of Evidence, gives the trial court the responsibility of screening evidence that will be heard by the jury. Such Rules do not make the trial judge the arbiter of credibility, but rather the "gatekeeper" of the type of evidence that will be heard. The jury retains the responsibility to decide whether witnesses that ultimately testify are credible.

The State cites *Logerquist v. McVey*, *supra*, in support of its argument that the statute is unconstitutional because it invades the province of juries. However, the passage cited by the State refers to the Arizona Supreme Court's rejection of the *Daubert/Joiner/Kumho* interpretation of Rule 702: "We thus conclude that we should not and cannot adopt the *Joiner* and *Kumho* interpretation of *Daubert* but will continue to apply Ariz.R.Evid. 702 as written." *Id.* at 489, ¶56, 1 P.3d at 132. In so holding, the Court specifically noted that "[w]e do not reject *Kumho* on a constitutional basis but because the authority over the admission of evidence given to trial judges by *Kumho* is much different from the authority long recognized by the Federal Rules of Evidence and the common law of evidence." *Id.* at ¶ 55. Thus, the State's reliance on *Logerquist* for its constitutional argument is flawed. The statute does not invade the province of the jury.

Is the statute procedural or substantive?

The next question is whether the statute is procedural or substantive. "[T]he issue of whether an enactment is procedural or substantive cannot turn on the record made in

legislative hearings." *Seisinger*, supra, 220 Ariz. *Id.* at 92, ¶25, 203 P.3d at 490. Instead, the issue is one of law. *Id.*

"In general, procedural law relates to the manner and means by which a right to recover is enforced or provides no more than the method by which to proceed. . . . Substantive law 'creates, defines and regulates rights' while a procedural law establishes only 'the method of enforcing such rights or obtaining redress.'" *State Compensation Fund of Arizona v. Fink*, 224 Ariz. 611, 614, ¶14, 233 P.3d 1190, 1193 (App. 2010) (citations omitted).

To decide whether the statute is substantive, the Court must determine "whether the statute enacts, at least in relevant part, law that effectively 'creates, defines, and regulates rights.'" *Seisinger*, supra, at 91, ¶29, 203 P.3d at 489. In *Seisinger*, the Arizona Supreme Court determined that "the requirement of expert testimony in a medical malpractice action is a substantive component of the common law governing this tort action. The common law requirement reflected a policy decision by the courts that the plaintiff's substantive burden of production could only be met by a particular kind of evidence." *Id.* at 95, ¶38, 203 P.3d at 493.

The Court finds *Seisinger* distinguishable. In that case, the statute controlled a substantive component of an element of a tort action. *Seisinger* dealt with a specific cause of action (medical malpractice) and the specific evidence required to prove it. Here, the statute applies to all civil and criminal cases, and to all expert testimony. It does not apply to a specific element of a specific cause of action or crime. It does not create, define or regulate rights, but establishes the method by which to proceed. A.R.S. § 12-2203 establishes the method by which the trial court will consider the admissibility of expert opinion testimony; it is therefore procedural.

Because the statute conflicts with Rule 702 and is procedural, it is unconstitutional. A.R.S. § 12-2203 infringes on the Arizona Supreme Court's authority to promulgate procedural rules, and thus violates the separation of powers doctrine. "[I]n the event of irreconcilable conflict between a procedural statute and a rule, the rule prevails." *Seisinger*, supra, at 89, ¶8, 203 P.3d at 487. The Legislature cannot enact a statute that creates a framework for analysis which is contrary to the rules of evidence. *Id.* at ¶9, citing *Barsema v. Susong*, 156 Ariz. 309, 314, 751 P.2d 969, 974 (1988). That is what the Legislature has done here by enacting A.R.S. § 12-2203.

CONCLUSION:

A.R.S. § 12-2203 irreconcilably conflicts with Rule 702 as interpreted by the Arizona Supreme Court. Therefore, the Court finds the statute unconstitutional.

IT IS ORDERED granting the States' Motions to Declare A.R.S. § 12-2203 Unconstitutional.

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. RICHARD S. FIELDS | CASE NO. CR20092214-001

COURT REPORTER: N/A | DATE: October 4, 2010

STATE OF ARIZONA
Plaintiff

vs

WILLIAM ALLEN LEAR
Defendant

RULING

IN CHAMBERS RULING RE: STATE'S MOTION TO DECLARE A.R.S. § 12-2203 UNCONSTITUTIONAL and DEFENDANT'S MOTION FOR STAY

On September 27, 2010, this Court heard argument on the State's Motion to Declare A.R.S. § 12-2203 Unconstitutional. The Court ruled from the bench in the State's favor finding the statute unconstitutional, and noted that a written ruling would issue. In response, the Defense motioned for a stay of proceedings in order to take the issue to the Arizona Court of Appeals. The parties were granted leave until September 28, 2010, to forward any additional briefings to the Court.

Having received the additional briefings, reviewed the original briefings, the file, and considered argument of parties, this Court now rules that the Defendant's Motion for Stay is **GRANTED.**

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Dani A. DuBois
Law Clerk

LAW & ANALYSIS

Constitutionality of A.R.S. § 12-2203

The State has argued that A.R.S. § 12-2203 usurps the Court's rulemaking authority and violates the separation of powers doctrine. The State is correct.

On July 29, 2010, A.R.S. § 12-2203 became effective creating a statutory scheme for the admission of expert opinion testimony at trial. The statute reads as follows:

> **§ 12-2203. Admissibility of expert opinion testimony**
> A. In a civil or criminal action, only a qualified witness may offer expert opinion testimony regarding scientific, technical or other specialized knowledge and the testimony is admissible if the court determines that all of the following apply:
> 1. The witness is qualified to offer an opinion as an expert on the subject matter based on knowledge, skill, experience, training or education.
> 2. The opinion will assist the trier of fact in understanding the evidence or determining a fact in issue.
> 3. The opinion is based on sufficient facts and data.
> 4. The opinion is the product of reliable principles and methods.
> 5. The witness reliably applies the principles and methods to the facts of the case.
>
> B. The court shall consider the following factors, if applicable, in determining whether the expert testimony is admissible pursuant to subsection A:
> 1. Whether the expert opinion and its basis have been or can be tested.
> 2. Whether the expert opinion and its basis have been subjected to peer reviewed publications.
> 3. The known or potential rate of error of the expert opinion and its basis.
> 4. The degree to which the expert opinion and its basis are generally accepted in the scientific community.

However, the Arizona Constitution gives the Supreme Court, not the legislature, the power to make rules relative to all procedural matters in any court. Article 6, §5(5), *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 590, 691 P.2d 678, 681 (1984). Pursuant to this power, in 1977 the Arizona Supreme Court promulgated the Arizona Rules of Evidence,[1] and with them Rule

[1] "Rules of evidence have generally been regarded as procedural in nature." *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 590, 691 P.2d 678, 681 (Ariz.,1984).

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702 under which Arizona courts determine the admissibility of expert opinion testimony. The rule reads:

> "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."

Although consistent statutory additions to the rules of evidence have been recognized, e.g., *Seidel*, 142 Ariz. at 591, 691 P.2d at 682, the Supreme court has drawn a line when a statute "tends to engulf" the rules of evidence. *State v. Robinson*, 153 Ariz. 191, 197, 735 P.2d 801, 807 (1987) quoting *Seidel*, 142 Ariz. at 591, 691 P.2d at 682.

Here, the statutory enactment engulfs Rule 702. *See Seisinger v. Siebel*, 220 Ariz. 85, 89, 203 P.3d 483, 487 (2009) ("The legislature thus cannot repeal a rule of procedure or evidence.").

Under Rule 702, before admitting expert opinion testimony, the court must determine whether 1) the potential witness is qualified as an expert by knowledge, skill, experience, training or education, and 2) the qualified expert's testimony will assist the trier of fact. A.R.S. § 12-2203 extends well beyond the Rule embracing something more akin to the *Daubert* standard, which the Arizona Supreme Court has consistently rejected. e.g., *Logerquist v. McVey*, 196 Ariz. 470, 472, 1 P.3d 113, 115 (2000) (rejecting Daubert); *State v. Johnson*, 186 Ariz. 329, 331, 922 P.2d 294, 296 (1996); *State v. Bible*, 175 Ariz. 549, 578, 858 P.2d 1152, 1181 (1993).

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Nor is A.R.S. § 12-2203 a codification of *Frye*, which has long been the common law in Arizona for admission of novel scientific testimony. *Frye v. United States,* 293 Fed. 1013 (D.C.Cir.1923); *see Seisinger* (partially codifying common law medical malpractice actions by enacting A.R.S. § 12-563).

Under A.R.S. § 12-2203, a witness, otherwise qualified under Arizona Rules of Evidence, Rule 702, would be precluded if they did not meet other standards set by the statute. This is not reasonable and workable with Rule 702, and in fact, conflicts with it by reaching far beyond mere "assisting the trier." When the legislature, by statute, precludes evidence otherwise admitted by the Rules of Evidence, it usurps the Court's rulemaking authority.

Is the Statute Procedural or Substantive?

A determination that a statute and court rule cannot be harmonized is only the first step in the separation of powers analysis: the provision must also be found to be procedural, rather than substantive. *Siebel*, 220 Ariz. at 91, 203 P.3d at 489. If the challenged statute is found to be substantive, the statute must prevail. *Id.* at 92, 490. In a case such as this, where statutes relating to evidence are concerned, the ultimate question is whether the "statute enacts, at least in relevant part, law that effectively creates, defines, and regulates rights." *Id.* at 93, 491 (internal quotations omitted).

Unlike the statute in *Seisinger* (A.R.S. § 12-2604(A)), A.R.S. § 12-2203 is not an attempt by the legislature to specify the *kind* of expert testimony necessary to establish an element of a specific tort or crime (e.g., only a physician can establish the standard of care in a medical malpractice case). Rather, A.R.S. § 12-2203 attempts to raise the qualifications uniformly for all expert testimony whether that testimony goes to a specific element of a crime or tort, or not. In

this way, in relevant part, A.R.S. § 12-2203 is not creating, defining, or regulating any rights, it is establishing the method by which the court will consider the admissibility of expert testimony. Therefore, the statute is procedural and offends the separation of powers doctrine. In effect, the legislature has impermissibly abrogated Rule 702.

The Statute Impermissibly Encroaches on the Province of the Jury

Not only is the statute unconstitutional in that it prescribes the method in which trial courts must qualify a witness beyond that promulgated by the Arizona Supreme Court in Rule 702, the statute also invades the province of the jury. When assessing whether testimony will assist the trier under rule 702, the court must necessarily consider some, if not all, of the information articulated in A.R.S. § 12-2203, at some level. It would be anomalous to assert that such considerations are never made. However, to mandate such considerations as requirements of admission necessarily appoints the judge as the sole arbiter of credibility and therefore improperly "encroach[es] on the province and independence of the jury." *Logerquist,* 196 Ariz. at 490, 1 P.3d at 133 (2000).

A.R.S. § 12-2203 effectively mandates that a judge assume the power "to reduce the evidence to a scintilla by excluding otherwise admissible testimony from qualified witnesses simply because [the judge may] disagree with the opinion's basis or believe the expert untrustworthy or unreliable." *Id.* The statute impermissibly encroaches on the province of the jury as these are assessments of credibility and weight – functions accorded to the jury by the Arizona Constitution. *Id.* at 487, 130.

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The Pima County Attorney's Authority

The Defense contends that the Pima County Attorney lacks the authority to seek to invalidate a statute duly enacted by the legislature. However, as aptly argued by the State at the motions hearing, this is not an instance where the Pima County Attorney has instituted a lawsuit or has reached out unnecessarily to litigate an issue. The State's motion regarding the constitutionality of the statute was filed in response to the Defense's motion to preclude the State's witness under the same statute. It is well within the ambit of A.R.S. § 11-532 for the County Attorney to file appropriate motions in pursuit of its duty to conduct prosecutions for public offenses. A.R.S. § 11-532(1).[2]

MOTION FOR STAY

The issue of the constitutionality of A.R.S. § 12-2203 arose from the Defense's motion to preclude the State's witness, Wendy Dutton, in accord with this new statute, from testifying as an expert at trial. Upon ruling in the State's favor that the statute is unconstitutional, the Defense made an oral motion for a Stay of Proceedings in order to file a special action with the Arizona Court of Appeals.

The State has argued that a stay is not necessary in that Ms. Dutton's testimony does not fall under A.R.S. § 12-2203, as she does not testify to an opinion. Instead, as the State contends, Ms. Dutton's testimony "more properly falls within the "otherwise" category of Rule 702 . . . ". (State's Motion).

The argument is one of semantics. Under A.R.S. § 12-2203, "a qualified witness may offer expert opinion testimony regarding scientific, technical, or other specialized knowledge . .

[2] Further, there is nothing that sets apart the County Attorney so as to preclude him or her from making a constitutional challenge when he or she clearly has standing to do so.

Dani A. DuBois
Law Clerk

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.." Under Rule 702, a qualified witness may testify in the form of an opinion "or otherwise," if scientific, technical, or other specialized knowledge will assist the trier of fact.

The State's contention is that because Ms. Dutton is a "blind expert," she does not offer an opinion, and therefore she still qualifies to testify under Rule 702 as A.R.S. § 12-2203 only applies to cases where the witness provides an opinion as to the facts of the case. *Cf. State ex rel. Collins v. Seidel,* 142 Ariz. at 591, 691 P.2d at 682 . The court notes that simply because Ms. Dutton does not opine on the actual facts of the case, does not mean that her testimony, based on her "specialized knowledge," is not scrutinized and challenged as opinion; particularly as her opinion on relevant information in her area of testimony. Further, despite the proposition that Ms. Dutton is a "blind expert," her testimony is applied to the facts of the case by jurors; this is the import of "assisting the trier." It is this process that effectively makes her testimony her opinion on the case.

As to A.R.S. § 12-2203,[3] Ms. Dutton's testimony is challengeable on several grounds and would be precluded. Therefore, should A.R.S. § 12-2203 be found constitutional, admission of Ms. Dutton's testimony would be improper, and on the facts of this case, would create reversible error.

[3] And implicit in the State's motion to find the statute unconstitutional.

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Law Clerk

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A stay is proper and the Defendant's Motion for Stay is **GRANTED**.[4] The trial scheduled to begin on October 12, 2010 is vacated. A status conference relative to trial date shall be held on October 15, 2010 at 9:00 a.m. in Division 18.

Dated this _____ day of October, 2010.

HON. RICHARD S. FIELDS

cc: Hon. Richard S. Fields
James W. Stuehringer, Esq, Atty for Defendant
Carolyn Nedder, Deputy County Atty
Susan Eazer, Deputy County Atty

[4] The Court has previously ruled on the Defendant's Rule 403 argument.

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Dani A. DuBois
Law Clerk

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

WILLIAM ALLEN LEAR, Petitioner, v. HON. RICHARD S. FIELDS, Judge of the Superior Court of the State of Arizona, in and for the County of Pima, Respondent, and THE STATE OF ARIZONA, Real Party in Interest.	2 CA-SA 2010-0074 DEPARTMENT A OPINION

SPECIAL ACTION PROCEEDING

Pima County Cause No. CR20092214001

JURISDICTION ACCEPTED; RELIEF DENIED

Waterfall, Economidis, Caldwell,
Hanshaw & Villamana, P.C.
By James W. Stuehringer
Tucson
Attorneys for Petitioner

Barbara LaWall, Pima County Attorney
By Jacob R. Lines
Tucson
Attorneys for Real Party in Interest

E S P I N O S A, Judge.

¶1 In this special action, we are asked to decide whether A.R.S. § 12-2203, which governs the admissibility of expert testimony, is constitutional. For the reasons stated below, we accept jurisdiction. But because the respondent judge correctly found the statute usurps the supreme court's rule-making authority and violates the separation of powers doctrine, we deny relief.

FACTS AND PROCEDURAL BACKGROUND

¶2 In the underlying criminal action, petitioner William Lear was charged with continuous sexual abuse of a child, in violation of A.R.S. § 13-1417. The victim, Lear's daughter, apparently delayed reporting the alleged acts and made conflicting statements to various individuals about sexual acts Lear purportedly had engaged in with her. Although at various points she retracted the allegations, she also reasserted them, insisting Lear had molested her.

¶3 Real party in interest State of Arizona disclosed its intent to call Wendy Dutton to testify as its expert regarding Child Sexual Abuse Accommodation Syndrome (CSAAS). Dutton has a master's degree in marriage and family counseling and routinely testifies as an expert about the character traits of child sexual abuse victims. The state anticipates she will testify in this case that: (1) child victims of sexual abuse often delay reporting intrafamilial abuse and the reasons for the delay; (2) child victims of intrafamilial sexual abuse may recant truthful allegations of abuse and the circumstances in which they recant; and (3) children who testify about sexual abuse commonly exhibit

the concept of "script memory," the way in which a child retrieves and processes memories of similar events. The state intends to present Dutton as a "blind expert," that is, it intends to elicit testimony from her about general characteristics of child sexual abuse victims, not this particular victim. Dutton has had no contact with and has not evaluated this victim individually, nor has she reviewed any statements or reports of any kind related to the allegations.

¶4 In July 2010, Lear filed a motion to preclude the state from calling Dutton to testify at trial as an expert. Lear asserted in his motion that, "[i]n an effort to adopt the expert witness limitations of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), and *Kumho Tire Co.,Ltd. v. Carmichael*, 526 U.S. 137 (1999), the legislature recently passed A.R.S. § 12-2203[,] which goes into effect on July 29, 2010." Relying to a large degree on the June 2010 interview of Dutton by Lear's counsel, Lear asserted "the proposed expert testimony of Ms. Dutton conflicts in several material respects with §12-2203," and the respondent judge should preclude her testimony. The state filed a response to the motion, arguing the statute did not apply to the kind of testimony Dutton was expected to provide and, even if applicable, the testimony was admissible under the statute as well as Rule 702, Ariz. R. Evid. Subsequently, it filed a motion asking the respondent to declare § 12-2203 unconstitutional, requesting that the court instead apply Rule 702 and the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), to determine whether Dutton should be permitted to testify. Lear filed his response and the respondent judge held a hearing on the motions.

¶5 The respondent subsequently issued a lengthy minute entry order in which he agreed with the state that the statute "usurps the [Supreme] Court's rulemaking authority and violates the separation of powers doctrine." Quoting our supreme court's decision in *Logerquist v. McVey*, 196 Ariz. 470, ¶ 59, 1 P.3d 113, 133 (2000), the respondent found the statute unconstitutional for the additional reason that it "necessarily appoints the judge as the sole arbiter of credibility and therefore improperly 'encroach[es] on the province and independence of the jury.'" The respondent applied Rule 702 and *Logerquist*, rather than § 12-2203, and denied Lear's motion to preclude Dutton from testifying. It noted, however, that were § 12-2203 constitutional, it would have precluded Dutton's testimony for a number of reasons. The respondent then granted Lear's request to stay further proceedings, permitting him to challenge the ruling in this special action.

SPECIAL ACTION JURISDICTION

¶6 Both parties urge this court to accept jurisdiction of this special action. We do so for the following reasons. First, the order from which Lear is seeking relief is interlocutory in nature. *See Potter v. Vanderpool*, 225 Ariz. 495, ¶ 7, 240 P.3d 1257, 1260 (App. 2010). Second, and more importantly, we agree with the parties that this special action involves "an issue . . . [that] is of first impression of a purely legal question, is of statewide importance, and is likely to arise again." *Vo v. Superior Court*, 172 Ariz. 195, 198, 836 P.2d 408, 411 (App. 1992). This special action involves the interpretation of a newly enacted statute that affects the admissibility of expert testimony in all trials, a pure question of law. *See Nordstrom v. Cruikshank*, 213 Ariz. 434, ¶ 9, 142 P.3d 1247, 1251 (App. 2006) (given number of cases remanded for resentencing in light

of Supreme Court decision and likelihood issues would recur, interpretation and application of sentencing statutes constituted matter of statewide importance to litigants and judiciary and acceptance of special action jurisdiction appropriate); *see also O'Brien v. Escher*, 204 Ariz. 459, ¶ 3, 65 P.3d 107, 108 (App. 2003) (finding cases presenting purely legal issues of first impression and statewide importance and likely to recur particularly appropriate for special action review). However, because the respondent judge did not abuse his discretion in finding the statute unconstitutional, we deny Lear special action relief. *See* Ariz. R. P. Spec. Actions 3(c) (providing abuse of discretion among bases for granting special action relief); *see also Carondelet Health Network v. Miller*, 221 Ariz. 614, ¶¶ 2, 19, 212 P.3d 952, 954, 957 (App. 2009) (accepting special action jurisdiction because issue of statewide importance but denying relief because respondent judge did not abuse discretion).

DISCUSSION

¶7 The Arizona Constitution identifies the three branches of government—the legislative, executive, and judicial—and provides that they "shall be separate and distinct, and no one of such departments shall exercise the powers properly belonging to either of the others." Ariz. Const. art. III. Among the powers ascribed to the supreme court is the "[p]ower to make rules relative to all procedural matters in any court." Ariz. Const. art. VI, § 5(5). "Rules of evidence 'have generally been regarded as procedural in nature.'" *Seisinger v. Siebel*, 220 Ariz. 85, ¶ 7, 203 P.3d 483, 486 (2009), *quoting State ex rel. Collins v. Seidel*, 142 Ariz. 587, 590, 691 P.2d 678, 681 (1984). Our supreme court clarified in *Seisinger*, however, that the authority to promulgate procedural rules does not

belong exclusively to the supreme court; rather, "it is more accurate to say that the legislature and [the supreme court] both have rulemaking power, but that in the event of irreconcilable conflict between a procedural statute and a rule, the rule prevails." *Id.* ¶ 8.

¶8 "Determining whether a statute unduly infringes on [the supreme court's] rulemaking power requires analysis of the particular rule and statute said to be in conflict." *Id.* ¶ 10. We must attempt to harmonize the two by construing the statute, "if possible . . . so that it does not violate the constitution." *Readenour v. Marion Power Shovel*, 149 Ariz. 442, 445, 719 P.2d 1058, 1061 (1986); *see also In re Pinal County Mental Health No. MH-201000076*, 596 Ariz. Adv. Rep. 24, ¶¶ 7-12 (Ct. App. Nov. 22, 2010) (finding statutes applicable to civil commitment proceedings constitutional because not in conflict with Rules 702 and 703, Ariz. R. Evid., and substantive in nature). As our supreme court stated in *Seisinger*, "statutory enactments that supplement rather than conflict with rules" promulgated by the court are not unconstitutional. 220 Ariz. 85, ¶ 8, 203 P.3d at 487. Before finding a statute unconstitutional, a court not only must find the statute conflicts with a rule but that the statute is procedural rather than substantive in nature. *Id.* ¶ 24.

¶9 Both before and since the legislature enacted § 12-2203, the admission of expert testimony has been governed by Rule 702, Ariz. R. Evid., and the standard set forth in *Frye* when the testimony related to novel scientific evidence. The rule, entitled "Testimony by Experts," provides as follows: "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." Under the *Frye* test, trial judges are charged with determining whether a scientific principle has "gained general acceptance" in the relevant scientific community such that an expert, whose testimony is based on that principle, may be regarded as sufficiently reliable to be permitted to testify. 293 F. at 1014. Arizona adopted the *Frye* test in 1962. *See State v. Valdez*, 91 Ariz. 274, 277-80, 371 P.2d 894, 896-98 (1962).

¶10 In *Daubert*, the United States Supreme Court interpreted language in Rule 702 of the Federal Rules of Evidence, which at that time was the same as the Arizona rule, and adopted an approach for determining the admissibility of scientific expert testimony that rejected the plain language of the rule and the *Frye* test as the sole criteria. The Court determined that a trial judge must serve as the "gatekeep[er]" for determining the admissibility of expert testimony by deciding first, "whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." 509 U.S. at 592, 597. That determination, the Court continued, "entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592-93. The Court suggested four factors for judges to consider in conducting that inquiry: whether the theory or technique "can be (and has been) tested," "whether the theory or technique has been subjected to peer review and publication," "the known or potential rate of error," and whether the theory or technique has been generally accepted by the relevant scientific community. *Id.* at 593-94.

¶11 In *General Electric Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire*, 526 U.S. 137, the Supreme Court clarified the scope of its decision in *Daubert*. The Court held in *Joiner* that *Daubert* applies to any conclusions an expert has reached, not just the expert's "'principles and methodology.'" 522 U.S. at 146, *quoting Daubert*, 509 U.S. at 595. Thus, a trial judge may preclude expert testimony if the judge finds "there is simply too great an analytical gap between the data and the opinion proffered" because "conclusions and methodology are not entirely distinct from one another" and "[t]rained experts commonly extrapolate from existing data." *Id.* In *Kumho Tire*, the Court further broadened the scope of *Daubert*, concluding it applies not only when an expert has relied on the application of a scientific principle, but also to testimony based on the expert's own skill and observations. 526 U.S. at 146-47, 151.

¶12 In *Logerquist*, a majority of the Arizona Supreme Court rejected the *Daubert* trilogy's[1] interpretation of the federal counterparts to Rules 702 and 703 of the Arizona Rules of Evidence and the test adopted in *Daubert* for determining the admissibility of expert testimony. The court confirmed it would continue to apply *Frye* "when an expert witness reaches a conclusion by deduction from the application of novel scientific principles, formulae, or procedures developed by others," but found *Frye* "inapplicable when a witness reaches a conclusion by inductive reasoning based on his or her own experience, observation, or research." 196 Ariz. 470, ¶ 62, 1 P.3d at 133. The

[1]*See Lohmeier v. Hammer*, 214 Ariz. 57, ¶¶ 32-33 & n.7, 148 P.3d 101, 110 & 110 n.7 (App. 2006) (noting that *Daubert*, *Joiner* and *Kumho Tire* often referred to as "*Daubert* trilogy").

court made clear its vigorous opposition to the broad gate-keeping power the *Daubert* trilogy had ascribed to trial judges, stating "[q]uestions about the accuracy and reliability of a witness' factual basis, data, and methods go to the weight and credibility of the witness' testimony and are questions of fact. The right to jury trial does not turn on the judge's preliminary assessment of testimonial reliability." *Id.* ¶ 52.

¶13 The court also made clear in *Logerquist* that judges still must rule on the admissibility of evidence based on the various rules of evidence, "and when the testimony is based on a novel scientific principle that the witness has taken from others and applied to the case at hand, the judge may, as a matter of foundation, require a showing of general acceptance." *Id.* ¶ 53. "Thus," the court concluded, "we retain the *Frye* rule but continue to apply it as described in [*State v.*] *Hummert*[, 188 Ariz. 119, 933 P.2d 1187 (1997)]. We reject the *Joiner/Kumho* interpretation of Fed. R. Evid. 702 and continue to apply Ariz. R. Evid. 702 as written and interpreted by our cases." *Id.* ¶ 65.

¶14 The legislature enacted § 12-2203 in May 2010 and it became effective on July 29, 2010. *See* 2010 Ariz. Sess. Laws, ch. 302, § 1. Entitled, "Admissibility of expert opinion testimony," it states as follows:

> A. In a civil or criminal action, only a qualified witness may offer expert opinion testimony regarding scientific, technical or other specialized knowledge and the testimony is admissible if the court determines that all of the following apply:
>
> 1. The witness is qualified to offer an opinion as an expert on the subject matter based on knowledge, skill, experience, training or education.

2. The opinion will assist the trier of fact in understanding the evidence or determining a fact in issue.

3. The opinion is based on sufficient facts and data.

4. The opinion is the product of reliable principles and methods.

5. The witness reliably applies the principles and methods to the facts of the case.

B. The court shall consider the following factors, if applicable, in determining whether the expert testimony is admissible pursuant to subsection A:

1. Whether the expert opinion and its basis have been or can be tested.

2. Whether the expert opinion and its basis have been subjected to peer reviewed publications.

3. The known or potential rate of error of the expert opinion and its basis.

4. The degree to which the expert opinion and its basis are generally accepted in the scientific community.

Agreeing with the state, the respondent judge found the statute "usurps the [Supreme] Court's rulemaking authority and violates the separation of powers doctrine." The respondent reasoned the statute does not supplement the rule but, quoting *State v. Robinson*, 153 Ariz. 191, 197, 735 P.2d 801, 807 (1987), and *State ex rel. Collins v. Seidel*, 142 Ariz. 587, 591, 691 P.2d 678, 682 (1984), "tends to engulf" it, finding the statute "extends well beyond . . . Rule [702,] embracing something more akin to the *Daubert* standard," which the supreme court rejected in *Logerquist* and other decisions.

¶15 In determining whether the respondent judge abused his discretion, *see* Ariz. R. P. Spec. Actions 3(c), we consider whether he committed an error of law, *see Potter*, 225 Ariz. 495, ¶ 6, 240 P.3d at 1260. And, as we previously stated, the interpretation of a statute is a question of law we review de novo. *Danielson v. Evans*, 201 Ariz. 401, ¶ 13, 36 P.3d 749, 754 (App. 2001). Our goal in interpreting a statute is to discern and implement the intent of the legislature when it enacted the law. *State v. Zinsmeyer*, 222 Ariz. 612, ¶ 28, 218 P.3d 1069, 1080 (App. 2009). "We first look to the plain language of the statute as the best indicator of legislative intent." *Id.*

¶16 In his special action petition, Lear concedes that, based on the language of the statute and the legislative history, the legislature intended "to adopt the expert opinion standard of *Daubert*."[2] He argues that "because the *Daubert* standard was the result of the U.S. Supreme Court's construction of an identical Rule 702, there is no conflict between the statute and Rule 702." He acknowledges this court is bound by the supreme court's decision in *Logerquist*, but asserts "that opinion bears reexamination especially because it did not address the constitutional separation of powers issues raised in the case at bar." He urges us "to distinguish *Logerquist* and to join the call for its reconsideration," citing the decision by Division One of this court in *Lohmeier v. Hammer*, 217 Ariz. 57, ¶ 53, 148 P.3d 101, 115 (App. 2006).

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[2]Although the statute's plain language makes that intent clear, we note that Lear has provided us with the Arizona Senate Fact Sheet, which expresses that intent unequivocally: the statute "[r]equires the courts to use the *Daubert* standard in civil and criminal actions to determine the admissibility of expert opinion testimony."

¶17 Even were we to agree with Lear that *Logerquist* should be reexamined, it is not for this court to do so; rather, we are compelled to follow supreme court precedent. *See State v. Miranda*, 198 Ariz. 426, ¶ 13, 10 P.3d 1213, 1216 (App. 2000), *aff'd*, 200 Ariz. 67, 22 P.3d 506 (2001). And based on the court's decision in *Logerquist*, as well as its discussion of the separation of powers doctrine in *Seisinger*, we do not believe *Logerquist* is meaningfully "distinguishable," nor do we believe the statute can be harmonized with the rule.

¶18 As we must, we adopt our supreme court's interpretation of Rule 702 and, consequently, construe it "as written and interpreted by our cases." *Logerquist*, 196 Ariz. 470, ¶ 65, 1 P.3d at 134. Comparing the rule and that interpretation of it to the plain language of § 12-2203, we can reach only one conclusion: the statute does not "supplement" the rule. *Seisinger*, 220 Ariz. 85, ¶ 8, 203 P.3d at 487. Rather, the legislature essentially has rewritten the rule to codify *Daubert* and has adopted the federal test for determining the admissibility of expert testimony, a test our supreme court rejected.

¶19 Having adopted the *Daubert* trilogy, as Lear concedes, the legislature has promulgated an evidentiary rule that ascribes to trial judges the kind of broad "gatekeeping" role the court in *Logerquist* opposed when it rejected such an interpretation of its own rule. In this respect, the statute essentially has repealed a rule of evidence. *See Seidel*, 142 Ariz. at 591, 691 P.2d at 682 ("The legislature cannot repeal the Rules of Evidence . . . made pursuant to the power provided . . . in article [VI], § 5."). The statute "provides an analytical framework contrary to the rules" of evidence.

Barsema v. Susong, 156 Ariz. 309, 314, 751 P.2d 969, 974 (1988). The rule and the statute "irreconcilabl[y]" conflict, *Seisinger*, 220 Ariz. 85, ¶ 8, 203 P.3d at 487, and, contrary to Lear's suggestion, they cannot be harmonized.

¶20 Simply because the rule and the statute conflict, however, we do not end our inquiry. As the respondent judge correctly noted, we also must determine whether the statute truly is procedural rather than substantive in nature. *Seisinger*, 220 Ariz. 85, ¶ 24, 203 P.3d at 489. We find helpful to our analysis the distinction between § 12-2203 and the statutes involved in *Seisinger* and *Pinal County Mental Health No. MH-201000076*. In *Seisinger*, the supreme court addressed the constitutionality of A.R.S. § 12-2604(A), which prescribes the requirements for introducing expert testimony on the standard of care in medical malpractice cases. 220 Ariz. 85, ¶¶ 15, 18-19, 42, 203 P.3d at 488, 494. The court found that, although the statute conflicted with Rule 702, *id.* ¶ 19, the statute nevertheless was "substantive in nature and d[id] not offend the separation of powers doctrine" because it changed the substantive law relating to medical malpractice actions, *id.* ¶ 42. Recognizing that the distinction between a substantive and procedural rule of law can be "'elusive,'" *id.* ¶ 29, *quoting In re Shane B.*, 198 Ariz. 85, ¶ 9, 7 P.3d 94, 97 (2000), the court stated, "The ultimate question is whether the statute enacts, at least in relevant part, law that effectively 'creates, defines, and regulates rights,'" *id.*, *quoting State v. Birmingham*, 96 Ariz. 109, 110, 392 P.2d 775, 776 (1964). The court examined the purpose of the statute within the context of medical malpractice actions and the common law and historical requirement for a particular kind of expert

testimony in such cases and concluded the statute effectuated a change in the "substantive common law, not merely a change in procedure." *Id.* ¶ 41.

¶21 Similarly, relying primarily on *Seisinger*, this court held in *Pinal County Mental Health No. MH-201000076* that A.R.S. §§ 36-533(B), 36-539(B), and 36-501(14), pertaining to civil commitment proceedings, are not unconstitutional for two reasons. First, they do not conflict with Rules 702 or 703 because they "do not govern the admissibility or relevance of expert testimony." 596 Ariz. Adv. Rep. 24, ¶ 10. Second, we found the statutes are "substantive in nature" because they "create, define and regulate rights and set the burden of proof for civil commitment." *Id.* ¶ 11.

¶22 Section 12-2203, however, is a general rule of evidence that, by its own terms, applies to the admission of expert testimony in "a[ny] civil or criminal action." § 12-2203(A). As the respondent judge noted, it does not alter any particular substantive law. It "engulfs" and supplants the existing rule with which it conflicts and therefore is unconstitutional because it violates the separation of powers doctrine. Thus, we conclude the respondent did not abuse his discretion in finding the statute unconstitutional on this ground and deciding to permit Dutton to testify based on Rule 702 and *Logerquist*, rather than § 12-2203. In light of this conclusion, we need not address the propriety of the respondent's determination that the statute also is unconstitutional because it "impermissibly encroaches on the province of the jury." *See* Ariz. Const. art. VI, § 27 ("Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law.").

¶23 For the reasons stated herein, we deny Lear's request for special action relief.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge