It's (Not) Bad, It's (Not) Bad, You Know It: The Growing Acceptance of the Fake Bad Scale

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Notes

“IT’S (NOT) BAD, IT’S (NOT) BAD, YOU KNOW IT”: THE GROWING ACCEPTANCE OF THE “FAKE BAD SCALE”

I. INTRODUCTION

A Florida woman, presumably harboring visions of a lofty settlement, walked into a local grocery store, secretly poured olive oil on the floor, and staged a “slip and fall.” Without surveillance videotape of the incident, the store manager would have difficulty proving that the woman faked the fall; the store could possibly incur thousands of dollars in court and settlement costs in the process of resolving the issue of liability for the woman’s injuries. Plaintiffs and their attorneys often embellish claims, overstate damage estimates, and outright fake injuries, absent scientific justification, in hopes that defendants will settle in order to avoid incurring greater losses. For many years, employers involved in workers’ com-

3. See Paul R. Lees-Haley et al., A Fake Bad Scale on the MMPI-2 for Personal Injury Claimants, 68 PSYCHOL. REP. 203, 204 (1991) ( theorizing that “[r]epresentatives of litigants deliberately exaggerate damages rather than attempting to present scientifically accurate assessments of plaintiffs damages”). Attorneys, mindful that prosperous settlements may result from litigation, often use tactics that make it difficult for defense attorneys to assess their case. See id. (stating that “attorneys openly admit they ‘ask more than [they] expect to get’ in making their demands, perhaps in part based on their belief that adversaries expect a negotiating process to ensue . . . [t]hey deliberately suppress clinically important data which might interfere with their goals”); see also United States v. Kaplan, 490 F.3d 110, 115 (2d Cir. 2007) (noting that one law firm, which had over three thousand active cases, had client base consisting of sixty to seventy of malingers, and within which, five to ten percent of clients staged accidents); Steven I. Friedland, Law, Science, and Malingering, 30 ARIZ. ST. L.J. 357, 359 (1998) (listing motivations driving personal injury litigants to feign illness and injury). With prospects of astronomical payouts and settlements in personal injury cases, scores of overly litigious plaintiffs, like the woman in the grocery store above, attempt to exploit the legal system by exaggerating injury claims, ranging from personal injury to workers’ compensation. See, e.g., Tresa Baldas, Are They Faking It, or Just Flunking Test?, MIAMI DAILY BUS. REV., Aug. 5, 2008, at 13 (citing case in which automobile accident victim, accused of malingering, won $1.4 million personal injury verdict): Verdicts & Settlements December 17, 2007: Collision at Red Light Causes Severe Brain Injury, LAW. Wkly. (VA), Dec. 17, 2007, at 1 (discussing plaintiff, who suffered injuries resulting
pensation suits, and others embroiled in personal injury litigation, lacked efficient scientific means to detect malingering plaintiffs and feigned injuries amongst compensation-seeking litigants—until now.4

Through the use of the “Fake Bad Scale” (FBS), a forty-three question True/False survey designed to detect malingering amongst plaintiffs, defense attorneys now have an effective evidentiary tool to combat frivolous injury claims.5 Defense experts (typically psychologists) administer the FBS survey to personal injury litigants during the pretrial phase—often after suspicions arise that the plaintiff has faked the injury.6 If the plaintiff’s responses on the FBS indicate malingering, the expert will testify on behalf of the defense using the underlying science of the FBS data in an effort to undermine the plaintiff’s injury claims.7

from traffic collision, and who scored conflicting results on test designed to distinguish exaggerating litigants, and yet ultimately settled with defendants for $3.5 million); see also Duckworth v. CSX World Crane, No. 07-60504466, 2008 WL 686576, at *1 (5th Cir. Mar. 12, 2008) (holding that plaintiff, who sought workers’ compensation, failed to prove prima facie case after plaintiff could not prove injury occurred on worksite and testifying witness said plaintiff planned to fake injury for pecuniary gain).

4. See Chantel S. Dearth et al., Detection of Feigned Head Injury Symptoms on the MMPI-2 in Head Injured Patients and Community Controls, 20 ARCHIVES CLINICAL NEUROPSYCHOL. 95, 96 (2005) (noting that certain kinds of faking related to personal injury were, until recently, “undetectable”). With the creation of the Fake Bad Scale (FBS), a validity test designed to “detect spurious symptoms in personal injury lawsuits,” faking is now easier to detect. See id. (stating that FBS “was more sensitive to feigned physical problems than traditional MMPI-2 indicators”); see also David Armstrong, Personality Check: Malingerer Test Roils Personal Injury Law; ‘Fake Bad Scale’ Bars Real Victims, Its Critics Contend, WALL ST. J., Mar. 5, 2008, available at http://online.wsj.com/article/SB120466776681911325.html (noting reliance on FBS greatly increased since 2006, after approval by Minnesota Multiphasic Personality Inventory (MMPI), esteemed publisher of psychological tests). For a discussion of the FBS generally, see infra notes 63-70 and accompanying text.

5. See Armstrong, supra note 4 (discussing prevalence of FBS amongst psychologists). A recent survey by St. Louis University found that seventy-five percent of neuropsychologists use the FBS to detect malingering. See id. (noting that many neuropsychologists rely on FBS during their expert witnesses testimony); see also Steve Rubenzer, Malingering of Psychiatric Problems, Brain Damage, Chronic Pain, and Controversial Syndromes in a Personal Injury Context, 56 FDCC Q. 499 (2006) (discussing success of FBS). The FBS shows promise detecting malingering in a variety of injuries including “feigned head injuries, chronic pain, mixed personal injury claimants, and (in some studies) PTSD.” See id. at 503 (noting that FBS is also effective in forensic settings).


7. See Sylvia Hseih, Defense Experts Using Controversial ‘Malingering’ Test, LAWYERS USA, Apr. 2, 2008, available at http://www.allbusiness.com/legal/evidence witnesses-expert/8956388-1.html (describing usage of FBS). Experts offer the FBS as “evidence that plaintiffs are fabricating or exaggerating their pain or other medical symptoms.” See id. (quoting attorney stating that many psychologists believe FBS “merits being used” in personal injury cases); see also Dorothy Sims, Cross-Examination of the Defendant Neurologist, Neuropsychologist, and Neuropsychiatrist, 2005 1
Since its inception in 1991, courts employed the FBS with ever-increasing frequency, even as debate about the test's legitimacy waged on in the academic world. Then, in 2006, the FBS was thrust to the legal forefront after the Minnesota Multiphasic Personality Inventory (MMPI), the most widely used standardized personality test in both legal and non-legal settings, added the FBS to its database of approved scoring materials. The MMPI's approval of the FBS gave the test credibility in the legal

ANN. 2005 ATLA-CLE 1323, 1323 (2005) (stating that "defense-oriented doctors" use FBS to determine that plaintiff is malingering").

8. See, e.g., James N. Butcher et al., The Construct Validity of the Lees-Haley Fake Bad Scale: Does this Scale Measure Somatic Malingering and Feigned Emotional Distress?, 18 ARCHIVES CLINICAL NEUROPSYCHOL. 473, 473-85 (2003) (suggesting that FBS results in false positives and incorrectly labels honest victims as "malingers"); Jon D. Elhai et al., Cross-Validation of the MMPI-2 in Detecting Malingered Posttraumatic Stress Disorder, 75 J. PERSONALITY ASSESSMENT 449, 449-65 (2000) (claiming that FBS is not best predictor of PTSD amongst available validity scales); Grant L. Iverson et al., Specificity of the MMPI-2 Fake Bad Scale as a Marker for Personal Injury Malingering, 90 PSYCHOL. REP. 131, 131-36 (2002) (arguing that suggested cutoff scores in FBS are incorrect and create response bias amongst respondents). Though some academics argue that the FBS is inefficient, other studies tout its successes. See, e.g., Patricia Babin & Patricia Rogers-Gross, Traumatic Brain Injury When Symptoms Don't Add Up: Conversion and Malingering in the Rehabilitational Setting, 68 J. REHAB. 4, 4 (2002) (touting success of FBS in differentiating between litigants and non-liti-gants); Eric F. Crawford et al., MMPI-2 Assessment of Malingered Emotional Distress Related to a Workplace Injury: A Mixed Group Validation, 86 J. PERSONALITY ASSESSMENT 217, 217-21 (2006) (declaring that FBS was lone measure, among all MMPI scales, that produced significant correlation with respect to malingering and workplace injuries); Glenn J. Larrabee, Detection of Symptom Exaggeration with the MMPI-2 in Litigants with Malingered Neurocognitive Dysfunction, 17 CLINICAL NEUROPSYCHOLOGIST 54, 54-68 (2003) (finding that FBS was best test for detecting malingering of neurocognitive deficit amongst litigants); Nathaniel W. Nelson et al., Meta-Analysis of the MMPI-2 Fake Bad Scale: Utility in Forensic Practice, 20 CLINICAL NEUROPSYCHOLOGIST 39, 39-58 (2006) (suggesting that FBS performs as well as, if not better than, any other validity scale, and may also be used in criminal setting); William T. Tsushima & Vincent G. Tsushima, Comparison of the Fake Bad Scale and Other MMPI-2 Validity Scales with Personal Injury Litigants, 8 ASSESSMENT 205, 205-12 (2001) (finding that personal injury litigants scored higher on FBS than other victims).


The University of Minnesota Press and Pearson Assessments announced the addition of the FBS (Symptom Validity) Scale to the Minnesota Multiphasic Personality Inventory-2 standard scoring materials . . . The University of Minnesota Press, publisher of the MMPI-2 test, sought input from a group of eight experts on the advisability of adding the FBS to the standard MMPI-2 test materials. A strong majority of these experts concluded that empirical research has established the utility of the scale in identifying potentially exaggerated claims of disability, primarily in the context of forensic neuropsychological evaluations.

Id.
world; since then, the FBS has captured the attention of many in the legal community. 10

In a world where as many as forty percent of all personal injury cases are exaggerated or outright faked, a tool capable of detecting malingering amongst plaintiffs is invaluable. 11 Like many developments in the legal field, however, the FBS has its drawbacks. 12 Whereas defense attorneys and scientists support the FBS as an effective tool for identifying “profit-seeking” litigants, plaintiffs’ attorneys argue that the FBS produces false positives and is a biased tool designed to discredit truthful claims. 13 Further, many plaintiffs’ attorneys argue that the FBS does not satisfy the standards for expert testimony set forth in Frye v. United States 14 and Daubert v. Merrill Dow Pharmaceuticals, 15 and thus should be inadmissible in court. 16 If the FBS meets the Frye and Daubert standards, the test is deemed “good science” and will likely be used more often in court. 17 If the FBS does not

10. See, e.g., Tresa Baldas, Polygraph Tests Gain Respectability in Court—No Lie, BROWARD DAILY BUS. REV., July 23, 2008, at 11 (comparing different lie detection techniques, including possibility of FBS as one method); Thomas B. Scheffey, Is the Plaintiff Really Faking It? Controversial Psychological Test Claims to Identify Malingerers, CONN. L. TRIB., Sept. 8, 2008, at 3 (discussing recent reactions to FBS); Dorothy Sims, Biased? Call It Malingering, N.J. L. WKLY. Apr. 11, 2005, at 15 (criticizing FBS for supposed unfair research methodology).

11. See Armstrong, supra note 4 (quoting estimate of Dr. John D. Griffith, who stated malingerers make up forty percent of all personal injury litigants); see also Paul R. Lees-Haley, MMPI-2 Base Rates for 492 Personal Injury Plaintiffs: Implications and Challenges for Forensic Assessment, 53 J. CLINICAL PSYCHOL. 745, 745-55 (1997) (concluding that between twenty to thirty percent of personal injury litigants in sample group feigned or exaggerated injuries).

12. For a discussion of the criticism surrounding FBS, see infra notes 73-76 and accompanying text.

13. See, e.g., Armstrong, supra note 4 (quoting both supporters and detractors of FBS). Dr. Lees-Haley, the creator of the FBS, argues that empirical evidence supports the effectiveness of the FBS. See id. (discussing Lees-Haley’s response to comments that FBS is “flawed”). One commentator criticizes the FBS, stating: “virtually everyone is a malingerer according to th[e] scale.” See id. (highlighting one commentator’s view that FBS shows “bias against women” and creates “unacceptably high’ rate of false verdicts of malingering”). For a comparison of studies supporting and criticizing the FBS, see infra notes 73-76 and accompanying text.

14. 293 F. 1013, 1014 (D.C. Cir. 1923) (stating expert testimony rule).


1. The Fake Bad Scale pulls physical and psychiatric symptoms that legitimate patients would endorse, and instead ascribes points towards malingering . . .
2. The Fake Bad Scale has a gender bias that is more likely to score women as malingering than men . . .
3. The test has been excluded by other trial courts.

Id.

meet these standards, however, it will not survive plaintiff’s Daubert or Frye challenge, and the test and related expert evidence will be inadmissible in the case in chief. Thus, malingerers who might otherwise have been rooted out will be permitted to proceed.

As the above ideological tug of war persists amongst scientists and academics, courts are also divided with respect to the credibility of the FBS. Some courts find the test has a valuable place in the courtroom; others find that the ongoing scientific debate renders the FBS unfit for the legal process. For example, in 2007, a Florida court denied the admissibility of the FBS because of the test’s potential bias. More recently in S.T. v. KBR, an administrative judge cited the plaintiff’s failing FBS score

Frye, expert testimony is admitted if it is “generally accepted.” See id. at 1581-82 (detailing Frye standards). Daubert, however, uses four criteria, including general acceptance. See id. at 1582-83 (discussing standards in Daubert). If the science is admitted under Daubert or Frye, depending on which standard the jurisdiction uses, this contributes, in part, to “decisions of admissibility for at least some types of evidence.” See id. at 1581 (discussing effect Frye and Daubert tests upon admissibility of evidence); see also James E. Ciecka et al., The New Gamboa Tales: A Critique, 12 J. LEGAL ECON. 61, 77-78 (2002) (stating “[t]he point behind the Daubert mandated ‘gate keeping’ role for federal judges is that expert testimony needs to be based on good science”).


19. For a discussion of the FBS under Frye and Daubert standards, see infra notes 161-209 and accompanying text.


22. See Brief for Plaintiff at *1, Davidson v. Strawberry Petroleum, 2007 WL 5084583 (Fla. Cir. Ct. 2007) (granting plaintiff’s motion to strike defense expert’s testimony because FBS is not supported by “hard medical science” and it is generally unreliable).

as a main consideration in dismissing the plaintiff’s disability claim.\textsuperscript{24} Because the FBS is relatively new, its admissibility under \textit{Frye} and \textit{Daubert} is still undetermined in jurisdictions that use those standards.\textsuperscript{25} Although the court in \textit{S.T. v. KBR} did not employ either the \textit{Frye} or \textit{Daubert} standard, the result of that case is nonetheless compelling because it is one of the first decisions to discuss the scientific validity and admissibility of the FBS in the courtroom.\textsuperscript{26}

This Note analyzes malingering in the courts, the history of the MMPI, and the competing scientific stances regarding the FBS’s effectiveness.\textsuperscript{27} Taking into account nearly twenty years of supporting studies, the MMPI’s endorsement of the research, and the rules of evidence that govern the FBS’s admissibility, the FBS has a valuable place in the courtroom, despite recent criticism.\textsuperscript{28} It is important to note that the FBS is not a substitute for the adversarial system—judges and juries still have the final say regarding the plaintiff’s claim.\textsuperscript{29} Rather, the FBS is simply a tool that helps enable litigators to detect malingering. Similar to other evidence, the FBS can be challenged or distinguished.\textsuperscript{30} The FBS is not a panacea for ridding the legal system of frivolous claims, but it is a step in the right direction.\textsuperscript{31}

\textsuperscript{24} For a discussion of \textit{S.T. v. KBR}, see infra notes 106-52 and accompanying text.

\textsuperscript{25} For a discussion of the FBS under \textit{Frye} and \textit{Daubert} standards, see infra notes 161-209 and accompanying text.

\textsuperscript{26} \textit{See} Franklin, \textit{supra} note 6 (noting lack of judicial treatment given to FBS and uncertainty regarding its admissibility under \textit{Frye} and \textit{Daubert}). \textit{See generally KBR, 2007-LDA-11} at 1-29 (dismissing plaintiff’s claim without undertaking \textit{Frye} and \textit{Daubert} analysis).

\textsuperscript{27} For a discussion of the history of the MMPI and FBS, see infra notes 52-70 and accompanying text.

\textsuperscript{28} For a discussion of the MMPI, see infra notes 52-62 and accompanying text.

\textsuperscript{29} \textit{See}, e.g., Simon A. Cole, \textit{Where Rubber Meets the Road: Thinking About Expert Evidence as Expert Testimony}, 52 \textit{Vill. L. Rev.} 803, 804 (2007) (noting that “[e]xpert evidence can be combated like all other evidence”). Attorneys may cross examine witnesses, may move to exclude irrelevant testimony, and may present evidence that counters the debated evidence. \textit{See id.} (listing acceptable tactics for attacking expert testimony). Further, dictum from \textit{Daubert} implies that methods combating expert testimony are encouraged. \textit{See id.} (noting that \textit{Daubert} anticipated and promoted use of such tactics). Even in cases where the FBS is admitted, the court is not bound to accept its findings as truth. \textit{See Franklin, supra} note 6 (illustrating tactics plaintiff’s attorneys can use to combat FBS). Attorneys can attempt to exclude the evidence in an evidentiary hearing, or can forgo challenging admissibility of evidence and instead try to attack its credibility. \textit{See id.} (same). One attorney found success using the latter of the two methods. \textit{See id.} (discussing attorney who made FBS “centerpiece” and aggressively cross examined defense expert to gain favorable jury verdict).

\textsuperscript{30} \textit{See} Cole, \textit{supra} note 29, at 804 (theorizing that, under \textit{Daubert}, acceptable methods for attacking adverse evidence apply).

\textsuperscript{31} \textit{See generally} John E. Meyers \textit{et al.}, \textit{A Validity Index for the MMPI-2}, 17 \textit{Archives Clinical Neuropsychol.} 157, 157-69 (2002) (concluding that litigants score higher on FBS than non-litigants, and that FBS is effective tool for detecting
Proper treatment of the FBS and malingering requires analysis of its development and scientific evaluations. Part II of this Note discusses malingering and its effect on the courts, the origins of the MMPI, and the birth of the FBS. Next, Part III describes the scientific research behind the FBS and the current debate in academia. Part IV discusses the facts giving rise to the decision in S.T. v. KBR and the prevalence of the FBS in the court’s decision making-process. Part V examines, in light of scientific research and the courts holding in S.T. v. KBR, the FBS’s ability to satisfy the standards set forth in Frye and Daubert. Finally, Part VI analyzes the impact of the S.T. v. KBR decision and the effect the admissibility of the FBS would have in curtailing malingering in the court system.

II. BACKGROUND

A. The Way You Fake You Feel: The Problem of Malingering

Malingering is a serious problem in the United States’ judicial system. Personal injury cases are rife with extreme financial implications, dependent on the success or failure of a plaintiff’s injury claims, and such personal injury plaintiffs often feign symptoms to gain favor. With so

32. For a discussion of the history of malingering and the FBS, see infra notes 38-70 and accompanying text.
33. For a discussion of the background of malingering, and the creation of the MMPI and FBS, see infra notes 38-70 and accompanying text.
34. For a discussion of empirical studies of the FBS and surrounding controversy, see infra notes 71-105 and accompanying text.
35. For a discussion of S.T. v. KBR, see infra notes 106-52 and accompanying text.
36. For a discussion of the FBS as applied under Frye and Daubert, see infra notes 153-209 and accompanying text.
37. For a discussion of the FBS’s potential impact in court, see infra notes 210-18 and accompanying text.
38. See Friedland, supra note 3, at 339 (acknowledging that “[t]he problem of malingering has weighed heavily on the American legal system”). When litigants malinger, ancillary effects include “damaging the lives of [involved] individuals” and threatening companies’ “financial well being” because of unfair damage settlements. See id. (highlighting effects of feigned injuries). Further, malingering adversely affects the legal system by undermining public confidence and threatening the system’s credibility. See id. (explaining far reaching affects of malingering); Lees-Haley et al., supra note 3, at 204 (emphasizing prevalence of malingering in judicial system). Often, attorneys “deliberately coach” plaintiffs to be effective malingerers in order to increase the likelihood of the odds of winning the case for their client. See Lees-Haley et al., supra note 3, at 204 (discussing malingering generally).
39. See generally Fitzgerald v. Stanley Roberts, Inc., 895 A.2d 405, 417-18 (N.J. 2006) (recognizing financial gain as possible motivation for malingering); see also O’Donnell v. Barnhart, 318 F.3d 811, 818 (8th Cir. 2003) (recognizing that judges may “discount a claimant’s allegations if there is evidence that a claimant was a malingerer or was exaggerating symptoms for financial gain”). Further, judges can dismiss the claims if there is evidence that the plaintiff is malingering. See

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much at stake financially for both parties, malingering is often an unfortunate end to the “by any means necessary” mantra in these cases. Before a proper analysis of malingering can occur, a definition of malingering is necessary.41

The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), the most relied upon handbook for psychological nomenclature, defines malingering as “the intentional production of grossly exaggerated physical or psychological symptoms, motivated by external incentives.” Commentators suggest three reasons why plaintiffs might mangle: anger at their employer, avoidance of work, and monetary reasons. Despite varied

O’Donnell, 318 F.3d at 818 (providing judicial remedy for defendants in malingering cases); Treat v. McDonald’s, 854 P.2d 393, 395 (Okl. Civ. App. 1993) (affirming finding of no damages where evidence in lower court indicated malingering); see also Brownt v. Heckler, 571 F. Supp. 140, 244 (N.D. Cal. 1983) (affirming expert’s conclusion that plaintiff was malingering for monetary reasons).


41. For a discussion of the definition of malingering and its effects on the judicial system, see infra notes 42-51 and accompanying text.

42. See Diagnostic & Statistical Manual of Mental Disorders (4th ed. 1994); see also Tam B. Tran, Using DSM-IV to Diagnose Mental Illness in Asian Americans, 10 J. CONTEMP. LEGAL ISSUES 335, 336-40 (1999) (outlining DSM). The Diagnostic and Statistical Manual of Mental Disorders (DSM) is the most comprehensive and researched manual of mental disability and is essentially a handbook describing mental disorders and their diagnoses. See Tran, supra, at 336-40 (explaining DSM). In the early twentieth century, a movement began amongst psychologists seeking uniformity in the nomenclature of psychological diseases to prevent misdiagnosis. See id. at 336 (describing reasons for DSM’s emergence). Though there were early efforts to create a uniform nomenclature, the American Psychiatric Association established the Committee on Nomenclature and Statistics and developed the first DSM in 1952. See id. (same). The DSM has undergone revisions in response to criticisms, and the most recent revision occurred in 1994. See id. (discussing revisions to DSM-IV). Today, an improved and heavily researched DSM includes issues about “psychosocial and environmental problems that influence diagnosis, treatment, and prognosis.” See id. (outlining changes made to DSM).

43. See Rose, supra note 2, at 368 (discussing plaintiff’s motivations for malingering); Jon D. Elhai et al., The Detection of Malingered Posttraumatic Stress Disorder with MMPI-2 Fake Bad Indices, 8 ASSESSMENT 221, 222 (2001) (outlining malingering motivations in PTSD litigants). Amongst PTSD litigants, motivations include: “financial gain, treatment seeking, reduction of charges and sentencing.” See Elhai, supra, at 222 (same); Frank Sparadeo, Malingering Tests: What Are They, What Are They Not, 2 ANN. 2004 ATLA-CLE 1, 2 (2004) (describing malingering as “deliberate, conscious feigning of symptoms for an ulterior purpose (e.g. avoiding work, receiving money, prolonging an illness with the intent to avoid a responsibility, avoidance of punishment/prosecution or obtaining medications)"); see also Glenn J. Larrabee, Exaggerated MMPI-2 Symptom Report in Personal Injury Litigants with Malingered Neurocognitive Deficit, 18 ARCHIVES CLINICAL NEUROPSYCHOL. 673, 673 (2003)
motivations among malingerers, one trait they share is a “deceitful state of mind.” Other psychologists suggest malingerers can exist at different levels such as “pure” and “partial” malingerer. Additional debate amongst psychologists concerns whether malingering is a mental disease or a conscious decision by those who are seeking to exploit others.

(outlining three ways in which malingering occurs in testing including: “(1) exaggeration of symptomatic complaint, (2) intentionally poor performance on neuropsychological testing, and (3) both exaggeration of complaint and intentionally poor performance”).

44. See Friedland, supra note 3, at 339 (highlighting nefarious incentives common amongst malingerers); see also Rose, supra note 2, at 370 (arguing that malingering goes underreported because “[m]alingering has a very negative connotation, hence the reluctance to include the term in a medical report by any medical professional”); Sparadeo, supra note 43, at 2 (noting that deceit associated with malingering leaves negative stigma attached to “malingering” label). The deceit associated with malingering “conjures up visions of slander and malpractice lawsuits.” See Rose, supra note 2, at 370 (explaining stigma associated with malingering).

45. See Friedland, supra note 3, at 343 (discussing various levels of malingering). Differing levels of malingering include:

- Dissimulation is the concealment or minimization of existing symptoms.
- Pure malingering is the feigning of disease or disability when it does not exist at all. Partial malingering is the conscious exaggeration of symptoms which do exist. False imputation is the ascribing of actual symptoms to a cause consciously recognized to have no relationship to the symptoms.

Id. Another researcher grades malingering and “defensiveness” in three degrees. See CLINICAL ASSESSMENT OF MALINGERING AND DECEPTION 13 (Richard Rogers ed., Guilford Press 2d ed. 1997) (detailing degrees of malingering). Malingering can result in one of three degrees. See id. (same). In “Mild Malingering,” evidence indicates that the plaintiff is malingering, but its effect is minimal amongst the diagnosis. See id. (same). In “Moderate Malingering,” the patient attempts to distort his diagnosis and appear “considerably more disturbed” than normal. See id. (same). “Severe Malingers” are “extreme in their fabrication to the point that the presentation is fantastic or preposterous.” See id. (same). Defensiveness is also determined on the same Mild-Medium-Severe scales but involves the denial of severity of certain medical problems rather than the exaggeration of symptoms. See id. (describing defensiveness related to patients assessment of their own injuries).

46. Compare Friedland, supra note 3, at 343 (discussing debate about nomenclature of malingering), and Rogers, supra note 45, at 6-7 (discussing “pathogenic model” of malingering which claims malingering is mental disability), with Toby Zimbalist, Liar, Liar, Your Back's Not On Fire: A Request for Review of the Admissibility of Expert Testimony on Malingering in Workers' Compensation Cases, Ariz. Att'y, Apr. 1994, at 20 (arguing ‘[m]alingering is not a mental disorder, but a pattern of behavior in which a person 'fake[s] or exaggerat[es] injury or illness in order to get money or various other payoffs...[i]n common parlance it’s called goldbricking or shamming”). Medical opinions regarding malingering are varied:

Some experts in the medical community look at malingering as a type of mental disease. Others believe ‘[t]here is a strange, entirely unfounded superstition even among psychiatrists that if a man simulates insanity there must be something mentally wrong with him in the first place’...[t]he Diagnostic and Statistical Manual of Mental Disorders does not resolve this dispute.

Zimbalist, supra.
Within the judicial realm, it is often up to the judge and jurors to determine the plaintiff's status as a malingering. Because discretion is left to judges and juries to decide these issues, the legal system has inherent buffers to prohibit malingering. Tactics to discover malingering have shown the most promise in workers' compensation and personal injury cases. Some states have even passed legislation to curtail malingering because it poses great problems in court. In addition to judicial

47. See Friedland, supra note 3, at 339 (noting process in which judges and jurors analyze malingering). Generally, jurors' common sense dictates whether—based on the available evidence—the plaintiff is malingering. See id. (same).

48. See id. at 344 (describing judicial "safeguards" in place to detect deceit). Both parties may cross-examine witnesses, an invaluable tool used to "probe and test the witness' assertions and to expose any inaccuracies that may exist in the witness' factual statements, assumptions or inferences." See id. at 345 (describing techniques available to attorneys at trial). Additionally, the opportunity to observe a witness's demeanor provides an invaluable tool for jurors. See id. (same). Even where expert witnesses are involved, such testimony is evidence rather than fact. See id. at 382 (supporting notion that expert testimony is not, in itself, "truth"). Further, malingering evidence should typically supplement the jury's common senses and provide helpfulness. See id. at 389 (discussing role of expert testimony); see also David S. Caudill, Legal Ethics and Scientific Testimony: In Defense of Manufacturing Uncertainty, Deconstructing Expertise and Other Trial Strategies, 52 Vill. L. Rev. 953, 974 (2007) (concluding that trial attorneys can use same tactics to cast doubt on evidence as expert witnesses). Prosecutors are not left without ways to counter the FBS:

Trial attorneys can do the same thing, as one of the lawyering techniques offered in trial advocacy training manuals is the "disagreement of experts" move:

Frequently you will have little ammunition to reduce the effectiveness of the [opposing] expert's testimony. In these situations the best you can realistically ... achieve is to level the playing field. Show that the experts on both sides are essentially equal and, in effect, cancel themselves out ... [t]his is always a useful approach whenever the other side's experts are either more impressive or more numerous." Caudill, supra, at 974 (citation omitted). For a discussion of Daubert and Frye as additional legal "buffers" for adverse expert testimony, see infra notes 161-209 and accompanying text.

49. See Friedland, supra note 3, at 380 (recognizing that "[t]estimony about malingering has been very favorably received in the area of disability claims, most notably in workers' compensation and personal injury cases ... [t]hese actions seek compensation for injuries, including difficult-to-detect neck, back and head injuries"). See generally Paul A. Arbisi & James N. Butcher, Psychometric Perspectives on Detection of Malingering of Pain: Use of the Minnesota Multiphasic Personality Inventory-2, 20 CLINICAL J. OF PAIN 383, 386 (2004) (recognizing effectiveness of MMPI scale in detecting malingering in workers' compensation cases); Eric Y. Drogan, "When I Said That I Was Lying, I Might Have Been Lying": The Phenomenon of Psychological Malingering, 25 MENTAL & PHYSICAL DISABILITY L. REP. 711, 711 (2001) (highlighting malingering in both criminal and workers' compensation contexts).

50. See, e.g., MD CODE ANN., LAB & EMPL. § 9-1106 (LexisNexis 2008) (creating penalty for malingers). This reads, in part, "(a) A person may not knowingly affect or knowingly attempt to affect the payment of compensation, fees, or expenses under this title by means of a fraudulent representation." Id. The Labor and Employment Code further states:

(a) Reimbursement. - In any administrative action before the Commission, if it is established by a preponderance of the evidence that a person
safeguards, malingering is detectable through various psychological tests such as the MMPI.\footnote{51}

B. Analyzing the “Man in the Mirror”: History and Origins of the MMPI Personality Test

The MMPI was originally published in 1943 by Starke Hathaway and Charles McKinley as a tool intended to help psychologists and psychiatrists detect personality disorders in patients.\footnote{52} The 550 multiple-choice-question survey was originally designed to pinpoint emotional disturbances.\footnote{53} Each group with a specific disorder is tested against a control group to find the response patterns for those with that specific disorder, thus making it difficult to “cheat” the test.\footnote{54} Today, the MMPI is by far the most

has knowingly obtained benefits under this title to which the person is not entitled, the Commission shall order the person to reimburse the insurer, self-insured employer, the Injured Workers’ Insurance Fund, the Uninsured Employers’ Fund, or the Subsequent Injury Fund for the amount of all benefits that the person knowingly obtained and to which the person is not entitled.

(b) Interest. - An order of reimbursement required under subsection (a) of this section shall include interest on the amount ordered to be reimbursed at a rate of 1.5% per month from the date the Commission notifies the person of the amount to be reimbursed.


\footnote{51} For a discussion of the MMPI, see \textit{infra} notes 52-62 and accompanying text.

\footnote{52} \textit{See} Tracy O’Connor Pennuto, \textit{Murder and the MMPI-2: The Necessity of Knowledgeable Legal Professionals}, 34 \textit{GOLDEN GATE U. L. REV.} 349, 354 (2004) (recalling that Hathaway and McKinley created MMPI because they sought “objective means of assessing human psychology”); David P. Saccuzzo, \textit{Still Crazy After All These Years: California’s Persistent Use of the MMPI as Character Evidence in Criminal Cases}, 33 U.S.F. L. REV. 379, 381 (1999) (describing MMPIs beginnings as test to determine “mental disorders”); \textit{see also} Nancy S. Erickson, \textit{Use of the MMPI-2 In Child Custody Evaluations Involving Battered Women: What Does Psychological Research Tell Us?}, 39 FAM. L. Q. 87 (2005) (discussing original intent of MMPI). The MMPI was created to diagnose psychiatric patients and diagnose psychological disorders in military personnel. \textit{See} Erickson, \textit{supra}, at 91 (same). In the 1930s and 1940s, at the time the MMPI was created, the test was designed with the belief that each individual fit into a distinct psychological category. \textit{See id.} at 92 (discussing original intent of MMPI database).

\footnote{53} \textit{See} Saccuzzo, \textit{supra} note 52, at 381-82 (discussing formation of MMPI question database). The MMPI questions are “self report” items related to one or more scales designed to create a psychological profile of the defendant. \textit{See id.} (describing MMPI items).

\footnote{54} \textit{See id.} at 382. (describing testing of MMPI). The MMPI testing is done through a criterion format. \textit{See id.} (same). If a criterion group consists of 100 people, their responses to the MMPI are compared with a control group that does not have that specific trait. \textit{See id.} (same). Then, whichever unique outlier responses differ between the control and non-control group are placed on a scale.

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widely used personality test in legal settings.\textsuperscript{55} Both state and federal courts use the MMPI extensively, primarily in litigation, to measure personality tendencies of litigants.\textsuperscript{56}

The successor to the MMPI, the MMPI-2, was published in 1989 to remove some archaic nomenclature used in the 1940s.\textsuperscript{57} The MMPI-2 re-standardized the scales from the first MMPI.\textsuperscript{58} Of all psychological assessments, the MMPI-2 is the most researched and most tested.\textsuperscript{59} Since its inception, thousands of studies have verified the reliability and validity of the MMPI and thus it has gained widespread approval within the psychological community.\textsuperscript{60} Further, the MMPI-2's consistency is supported statistically through strong "reliability coefficients."\textsuperscript{61} The MMPI has also

\textsuperscript{55} See id. (describing analysis of MMPI results). From there, the scale is developed and testers compare new test-takers with the responses of the control and non-control groups. See id. (describing usage of scale). If further correlation exists, then one can hypothesize that those with similar answers to the disabled group suffer from that ailment. See id. (recommending future utility of MMPI results).


\textsuperscript{57} See Pennuto, supra note 52, at 355 (summarizing origins of MMPI-2). The MMPI-2's predecessor, the MMPI, contained "out-dated and sexist language that was common in the 1940's." See id. (discussing problems with original MMPI). The MMPI-2 was created in part to remove this language and make the test more easily understood. See id. (detailing revisions to MMPI-2).

\textsuperscript{58} See id. at 355 (describing changes made to original MMPI).

\textsuperscript{59} See id. at 356 (discussing prevalence of MMPI-2).

\textsuperscript{60} See id. (noting volume of MMPI-2 studies). Because so many studies were conducted, "the reliability and validity of the MMPI-2 have been repeatedly established." See id. (confirming credibility of MMPI-2).

\textsuperscript{61} See id. (stating that "'[r]eliability refers to a test's 'ability to produce similar results when repeated measurements are made under identical conditions'"). The MMPI-2's reliability coefficients, which are indicative of the ability to produce
proved to be a successful test because it is heavily reviewed, reliable, efficient, objective, and easily interpreted. 62

C. Stopping Smooth Criminals: The Development of the FBS

Recognizing the utility of the MMPI database, Dr. Paul R. Lees-Haley created the FBS in 1991. 63 In his article introducing the FBS, Lees-Haley began by stressing the financial impact of malingering on the calculation of claims. 64 Lees-Haley predicted that certain MMPI scoring items, when isolated, could correctly distinguish malingerers from a control group. 65 He further studied a sample of medical outpatients because this group would closely resemble those seeking treatment for "accidents, toxic exposure, and stress on the job." 66

Lees-Haley claimed the FBS could identify behavior where the plaintiff was honest, exaggerating, faking, or hiding an injury. 67 Within the consistent results, are extremely high. See id. (describing reliability coefficients of MMPI-2).

62. See id. at 368 (describing strengths of MMPI-2). There are many reasons the MMPI-2 is accepted in courtrooms. The reasons for using the MMPI-2 in court are abundant and varied. These reasons mainly involve the ease of administration and scoring. Psychological researchers have identified six main reasons for the wide applicability of the MMPI-2 in forensic settings. First, the validity scales address the credibility of the individual's test-taking attitudes. Second, the MMPI-2 is interpreted objectively, using external, empirically based correlates. Third, the MMPI-2 has high test-retest reliability, and fourth, it has high inter-rater reliability. Fifth, the extensive research on the MMPI-2 is published in peer-reviewed journals. Finally, the results of the MMPI-2 are easy to communicate to non-psychologists, such as those involved in the judicial process. Thus, researchers have found that the ease of communication of MMPI-2 results, along with its validity, objectivity, and reliability, make it an ideal tool for use in forensic settings, such as the courts. Id.

63. See generally Lees-Haley et al., supra note 3, at 203-10 (promoting benefits of FBS).

64. See id. at 204 (discussing financial ramifications of malingering). For further discussion of the financial impact of malingering, see supra note 3 and accompanying text.

65. See generally Meyers et al., supra note 31, at 158 (explaining rationale behind selection of specific FBS items). The FBS testing questions "were chosen on a rational basis" reflecting malingerers' "response[s] specifically characterized by an attempt to appear to be honest . . . except for the impact of the alleged injury, and to present the effects of the injury in a plausible manner." Id. (same).

66. See Lees-Haley et al., supra note 3, at 204 (noting that "purpose of this study is to assess the potential utility of certain items on the MMPI-2 for discriminating claimants who are simulating or exaggerating emotional distress from claimants who are not malingering").

67. See id. at 204-05 (suggesting traits that FBS can detect). The FBS can detect various traits indicative of malingering: These reports can be described as considered analogous to goal directed behavior oriented towards ends such as: (1) to appear honest, (2) to appear psychologically normal except for the influence of the alleged cause of the injury, (3) to avoid admitting pre-existing psychopathology (4)
study, Lees-Haley developed a baseline cutoff score of twenty points to detect when signs of malingering became evident. Following the study, Lees-Haley claimed the test was a "promising procedure for the evaluation of simulation and exaggeration of emotional distress...specifically, the Fake Bad Scale appears to differentiate personal injury malingerers and a variety of types of personal injury simulators." Lees-Haley predicted that further research could verify these results.

III. "HEAL THE [LEGAL] WORLD": EMPIRICAL STUDIES VALIDATE THE FBS

After its introduction in 1991, multiple studies evaluated the effectiveness of the FBS. Most FBS-related research supports its usage both in the field of psychology and within the courtroom, in part, because it is a likely predictor of exaggerated claims. A small but passionate body of research, however, criticizes the FBS. Critics claim the FBS produces "false positive" scores and inappropriately labels as malingerers plaintiffs with legitimate claims. Proponents of the FBS aggressively refuted method where pre-existing complaints are known or suspected to have been disclosed to the examining clinician or likely to be disclosed to judge or jury, to attempt to minimize those complaints (5) to hide pre-injury behavior which is antisocial or illegal or to minimize this if it appears that the behavior will be discovered independently, (6) to present an extent of injury or disability within perceived limits of plausibility [these limits vary widely], (7) and related ends. These tendencies appear among malingerers as a group, but not all apply to every individual malingerer.

Id.

68. See id. at 206 (noting that cutoff score was chosen because it "most accurately differentiated malingering and nonmalingering claimants"). The cutoff point of twenty, however, is not meant to be a "hard and fast" line. See id. at 207 (explaining role of cutoff point).

69. See Lees-Haley et al., supra note 3, at 208-09 (supporting validity of FBS).

70. See id. at 209 (suggesting that further research was needed to validate project results). For a discussion of subsequent testing of the FBS, see infra notes 71-105 and accompanying text.

71. For a discussion of peer reviewed studies of FBS, see infra notes 71-105 and accompanying text.

72. See, e.g., Tsushima & Tsushima, supra note 8, at 205-12 (finding that personal injury litigants yield higher FBS scores than those who are not involved in lawsuits). This distinction would prove to be valuable in court to distinguish plaintiffs whose sole goals are monetary from those with more legitimate motives. See id. at 210 (finding FBS "more capable" than other MMPI scales to detect malingering); see also Michael J. Sharland & Jeffrey D. Gfeller, A Survey of Neuropsychologists' Beliefs and Practices with Respect to the Assessment of Effort, 22 ARCHIVES CLINICAL NEUROPSYCHOL. 213, 213-23 (2007) (recognizing FBS's potential utility in litigation and suggesting that FBS could satisfy Frye motion).

73. For a discussion of criticisms of the FBS, see infra note 74 and accompanying text.

74. See Butcher et al., supra note 8, at 473-85. (arguing FBS results produce in too many false positives); see also Iverson et al., supra note 8, at 131-36 (investigating specificity of FBS for identifying "negative response bias in personal injury claimants"). The study found that revising the cutoff scores could result in fewer false positives. See id. (suggesting revisions to FBS); see also Elhai et al., supra note 8, at 449-63 (suggesting FBS was not best predictor of PTSD amongst control group).
The methodology underlying the adverse studies and remain steadfast in supporting the FBS.\textsuperscript{75} Despite the wave of criticism, the overwhelming weight of research is favorable to the FBS.\textsuperscript{76}

Research shows that the FBS demonstrates significant promise in detecting malingering in a variety of fields.\textsuperscript{77} Recent studies demonstrate that the FBS is particularly effective in detecting malingering amongst compensation-seeking plaintiffs.\textsuperscript{78} In a study examining the FBS amongst litigants with head injuries, one researcher compared the effectiveness of the FBS to a number of other psychological tests.\textsuperscript{79} The aforementioned study concluded that the “FBS appears to be superior to the standard

Psychologists have also criticized the FBS in the media. \textit{See, e.g.}, Armstrong, supra note 4 (recognizing one psychologist’s disdain for FBS). One psychologist argues that “virtually everyone is a malingerer according to this scale” and that the FBS only benefits insurance companies defending claims. \textit{See id.} (discussing criticism of FBS).

75. \textit{See} Paul R. Lees-Haley \& David D. Fox, \textit{Commentary on Butcher, Arbisi, Atlis, and McNulty (2003) on the Fake Bad Scale}, 19 \textsc{Archives of Clinical Neuropsychol.} 333, 333-36 (2004) (arguing that Butcher’s criticism of FBS used flawed data sets that do not reflect groups who typically malinger, such as compensation-seeking litigants); \textit{see also} Armstrong, supra note 4 (discussing responses to studies criticizing FBS). Lees-Haley dismisses Butcher’s study, noting that “Butcher’s primary strategies for criticizing the FBS is to apply it to groups for which it was never intended, and then complain that it isn’t appropriate. Of course not. The FBS was designed for personal-injury claimants.” \textit{See} Armstrong, supra note 4 (defending FBS in light of negative treatment); \textit{see also} Kevin W. Greve, \textit{Response to Butcher et al., The Construct Validity of the Lees-Haley Fake Bad Scale}, 19 \textsc{Archives of Clinical Neuropsychol.} 337, 337 (2004) (criticizing Butcher’s interpretation of FBS data).

Another psychologist defended the FBS in light of Butcher’s study, arguing that Butcher’s study lacked the criterion group methods that Lees-Haley’s data contained. \textit{See} Greve, supra, at 337 (same). Without the same specificity as Lees-Haley’s original study, Butcher’s claims of “false positives” lack solid foundation. \textit{See id.} (same). One psychologist noted that though the FBS detects malingering, it does not, by itself, label the plaintiff as a malingerer. \textit{See id.} (criticizing Butcher’s conclusions). Thus, a positive FBS score will not, absent other evidence, “further traumatize” PTSD litigants, as Butcher suggests. \textit{See id.} at 338 (same). When the FBS is used in conjunction with other evidence, it is an effective tool in detecting malingering and is “clearly supported by empirical research.” \textit{See id.} (affirming utility of FBS in light of negative criticism).

76. \textit{See} Press Release, Pearson Assessments, supra note 9 (adding FBS to database of MMPI approved testing based upon weight of authority lending toward its credibility).


79. \textit{See id.} (“The correlational and diagnostic properties of Lees-Haley’s MMPI-2 Fake Bad Scale (FBS) were examined in litigating atypical minor, litigating moderate–severe, and non-litigating moderate–severe head injury samples.”). The study sought to distinguish the FBS from other scales in detecting malingering among litigants. \textit{See id.} (stating purpose of study).
MMPI infrequency... when litigation status is held constant," and touted the FBS as a more "promising tool" than the widely approved traditional MMPI scales. The study raised the possibility that the FBS could eventually gain the same widespread favor as the venerated MMPI.

In a 2003 study, a variety of psychological scales, including the FBS, were administered to a sample of thirty-three litigants. All of the previous participants in the study had exhibited behavior indicative of malingering. According to the data collected, the FBS was significantly more sensitive than other scales typically used to distinguish between exaggerating litigants and those that are honest. The study further concluded that research criticizing the FBS did not distinguish patient groups from compensation-seeking patients, and was thus inaccurate. In assessing the "mounting evidence" in favor of the FBS, the 2003 study determined that the supporting data and research was well-founded in light of the study.

Another similar study examined MMPI profiles and compared all of the MMPI validity scales for a large group of litigants. Of all of the scales, the study concluded that the FBS was the best validity scale for distinguishing compensation-seeking litigants from the clinical control group. Though the research was confined only to personal injury litigants, the researchers were encouraged by the FBS results, and suggested that the FBS should be used in other areas such as Social Security fraud claims.

80. Id. at 1598.
81. See generally id. (arguing that FBS is more useful than MMPI).
82. See Larrabee, supra note 43, at 673 (describing study's methodology).
83. See id. (describing history of test subjects). All participants had previously failed psychological testing that indicated the subjects were likely malingerers. See id. (same).
84. See id. at 680 (finding that "[t]he present investigation extends previous findings in showing that the Lees-Haley FBS is more sensitive... to the presence of malingering in personal injury settings"). The study concluded by stating that "[i]n closing, there is a growing body of research supporting the validity of the FBS in detecting exaggeration of symptom report on the MMPI-2 in personal injury litigants." Id. at 683.
85. See id. (arguing that research completed by Butcher et al., which criticized the FBS, was incomplete because it did not differentiate compensation-seeking groups from control group).
86. See id. at 674 (verifying that study further validated legitimacy of FBS).
87. See Tsushima & Tsushima, supra note 8, at 205-12 (examining forty-three patients, across several validity measures including FBS, to determine which was most effective in distinguishing malingering).
88. See id. at 208 (concluding that "results of the present investigation found FBS scores to be significantly higher... and are consistent with past studies which found that FBS scores to be higher among personal injury claimants as compared with nonclaimants").
89. See id. at 210 (suggesting that FBS should be tested against "broader range" of claims).
Other studies tested the specificity of the FBS in detecting malingering. In one study that conducted "back testing" on "known malingerers," the FBS correctly identified malingerers in eighty-six percent of cases. Much like the other studies, this study found that the FBS was particularly effective in distinguishing malingering amongst compensation-seeking litigants.

Another study examined the effectiveness of a variety of MMPI scales in detecting malingered emotional distress resulting from workplace injuries. A group of twenty-seven students were tested as a control group against a group of thirty-three patients. Nearly every MMPI validity scale proved ineffective at producing a correlation between malingering and the test scores, except for one scale—the FBS.

In response to the large number of psychologists using FBS data, one study sought to verify the methodology behind the FBS. This study sought to determine if the FBS data had a higher level of "specificity," which would mean the FBS was more effective than other MMPI indices. Testing data suggested that the FBS was at least as good as the widely supported MMPI, if not better.

The wide body of research supporting the FBS has not gone unnoticed in the psychology community. Before the MMPI added the FBS to its list of approved validity indices, the board reviewed the methodology underlying the FBS with a panel of eight experts. Because of the vast

90. See Meyers et al., supra note 31, at 157-69 (seeking to validate testing data of FBS).
91. See id. at 157 (summarizing study's findings). The data showed that "[i]n a group of knowledgeable actors (malingerers), 86% was correctly classified." See id. (verifying data behind FBS). The study also affirmed findings of other studies which stated that the MMPI-2 was particularly effective in detecting malingering amongst litigants. See id. (finding that "this study suggest[s] that chronic pain patients in litigation produce a different profile on the MMPI-2 validity scales than do non litigants").
92. See id. at 167 (concluding that study's results indicating that litigating patients show higher tendency to m altering builds upon earlier studies which indicated similar result).
93. See Crawford et al., supra note 8, at 217-21 (studying which MMPI index provided best method of detecting malingering amongst those injured at work).
94. See id. at 218 (discussing format of study). The control group was a group of psychology students recruited from Pacific and Stanford graduate psychology schools. See id. (same).
95. See id. at 220 (concluding that only "FBS proved to be effective in detecting malingering despite simulators' familiarity with psychopathology").
96. See Nelson et al., supra note 77, at 1-12 (seeking to validate formula behind scoring methodology of FBS).
97. See id. at 11 (discussing goals of study).
98. See id. (concluding that "both T-FBS and E-FBS scores appeared to show specificities that were as good, and at times superior to, other commonly applied MMPI-2 validity scales").
99. For a discussion of the FBS studies, see infra notes 71-98.
100. Press Release, Pearson Assessments, supra note 9 (announcing addition of FBS to MMPI-2). The eight-member board voted to approve the MMPI, with a
range of empirical research supporting the test’s validity, the only change the panel recommended was that the cutoff score be increased to twenty-two—only two levels higher than Lees-Haley’s recommendation from fifteen years earlier.101

A minority of the board expressed concerns regarding the “false positives” associated with the test.102 The board assuaged these concerns by noting the false positive rate for the FBS was not any higher than the other already approved tests of the MMPI.103 The panel’s endorsement of the FBS was the final push for the FBS, validating processes that psychologists had touted for fifteen years.104 The board’s decision was important for the legal community because it finally gave psychologists a reputable name to attach to their testimony, which was already been well-grounded in empirical studies.105

IV. S.T. v. KBR: Malingerers Are No Longer “Invincible” in Court

A. Facts

Steven Thompson was an experienced truck driver, who had fallen upon difficult times following his divorce and subsequent bankruptcy.106 six-to-two vote. See id. (discussing steps board undertook before including FBS in MMPI database).

101. See id. (discussing MMPI approval). The panel concluded that: [E]mpirical research has established the utility of the scale in identifying potentially exaggerated claims of disability, primarily in the context of forensic neuropsychological evaluations. They agreed that, as is the case with all other MMPI-2 validity scales, scores on the FBS should be considered in the context of scores on the other validity scales, the circumstances of the assessment, and any conditions such as significant physical injury or disease that could artificially elevate scores on the FBS. Id. The former baseline level was twenty—this change was to increase the reliability to an even higher percentage. See id. (justifying increase in baseline score).

102. See id. (discussing approval process). Butcher, the author of a contrary study, was one of these members. See id. (summarizing board members demographics).

103. See id. (comparing FBS to other MMPI-2 scales). The board pointed to the FBS’ error rate for scores indicating a strong chance of malingering, stating “existing literature indicates that raw scores above 28 on the FBS are associated with a very low false positive rate, which is consistent with the false positive rate of other standard MMPI-2 validity scales.” See id. (same).

104. For discussion validating empirical testing of FBS, see supra notes 71-98 and accompanying text.

105. For discussion validating empirical testing of FBS, see supra notes 71-98 and accompanying text.

Lured by lofty salary opportunities overseas, Thompson applied to drive trucks for KBR's Kuwait operation, a private convoy transporting military equipment. Thompson applied to drive trucks for KBR's Kuwait operation, a private convoy transporting military equipment. Only a few days after his arrival, KBR transferred Thompson to Iraq as a driver in military convoys.

While in Iraq, Thompson delivered military supplies as part of a fifteen truck convoy located fifty miles north of Baghdad. For his services, prior to his deployment. See id. (describing claimant deposition in which claimant admitted "[h]e was also having child support issues after a divorce"). Thompson's child support bill was $680.00 per month. See id. at 7 (describing Thompson's only bill when he was deployed). Though Thompson denied "financial stress," the witness deposition of psychiatrist Dr. Harold Lilly indicated that he had met with plaintiff with prior to plaintiff's departure from the country. See id. at 8 (outlining doctor's witness deposition). Dr. Lilly recalled speaking with Thompson about Thompson's financial stress, and stated that Thompson indicated he "went to Iraq . . . to be able to pay his child support." See id. (describing meeting between Lilly and Thompson). Though the visit appeared in Thompson's medical records, Thompson contended the visit never took place. See id. (analyzing inconsistencies in case). A therapist who met with Thompson in October 2005—after Thompson's return from Iraq—reported that Thompson felt "trapped by his child support demands" and that "he originally went to Iraq because he could not keep up with his child support." See id. at 11 (describing mental health evaluation from Sandhills Center for Medical Health). Upon reviewing Thompson's file, Dr. John Griffith confirmed that the plaintiff had visited with Behavioral Associates of Asheboro for "financial [child support] problems which were psychological in nature," before he had left the country. See id. at 17 (confirming Thompson's encounter with Dr. Lilly). Throughout the reported case, Thompson is not referred to by name, but only as "Claimant" or his initials, "S.T." See id. at 1-29 (referring to plaintiff only by his initials or as "Claimant"). Other news sources reporting this case, however, reveal that the plaintiff's name is Steven Thompson. See, e.g., Armstrong, supra note 4 (referencing Thompson by name).
Thompson garnered a weekly wage of $1,860.88. During convoy missions, Thompson "received action" in the form of enemy activity on the majority of his deliveries. Although Thompson did not suffer any physical injuries, small arms fire broke his truck's windows on several occasions. After a mission to recover damaged vehicles, Thompson decided he had "had enough"; he returned to the United States soon thereafter.

Upon returning to the United States, Thompson claimed he could no longer drive a truck and "did not know what the problem was." At his new jobs, Thompson struggled to maintain steady work, and later described himself as "explosive" and suffering from temper problems. In addition, Thompson experienced recurring nightmares regarding his experiences in Iraq. Thompson could not recall a single event that caused his condition but said it was based on a "continuum" of events.

While home, Thompson visited the "American Contractors in Iraq" website again transferred, this time to Mosul, Iraq. See KBR, 2007-LDA-11 at 4 (describing case facts).

110. See id. at 20 (highlighting Thompson's compensation).

111. See id. at 4 (describing convoy missions). The missions occurred in the evening because of the daytime heat and nighttime trips were less visible to attackers. See id. Thompson's deposition claimed that there was "enemy activity on 50% to 75% of the convoys." Id. Activity ranged from small incidents such as rocks being thrown at the truck to detonation of improvised explosive devices (IEDs). See id. At the beginning of his deployment, the trucks Thompson drove were not armored. See id.

112. See id. (describing nature of damage done trucks driven by claimant). Thompson noted that he "had no physical damage done [to him] . . . in six months there." Id. Thompson's vehicle, however, was damaged occasionally and his windows were broken by small arms fire "on more than three occasions." See id. Thompson recalled that during one incident an IED struck a convoy vehicle in front of him and the explosion damaged his windshield; Thompson had to kick out his windshield to see clearly. See id.

113. See id. at 5 (detailing Thompson's first mission in Mosul, Iraq). In November 2004, during a trip to recover damaged vehicles, Thompson encountered a truck with a corpse inside it. See id. (describing Thompson's reasons for leaving Iraq). As a result, Thompson took a temporary position as a bus driver on the base, transporting other drivers around. See id. Thompson stated that "he felt ashamed that he decided not to continue driving outside the wire." Id. Thompson then demobilized and returned to the United States. See id.

114. See id. (describing Thompson's difficulties upon his return to United States). Thompson tried to find work with a carpenter, but decided he was unable to get along with his boss. See id. (describing change in demeanor). Thompson also believed his temper affected his relationship with his then-girlfriend. See id. (stating that Thompson was "having problems with . . . [his] girlfriend, with everything").

115. See id. (tracking changes in Thompson's mood). Thompson later obtained another job working for the City of Greensboro, but was fired for "disciplinary reasons." See id. at 6 (discussing Thompson's employment history).

116. See id. at 5 (describing Thompson's account of recurring nightmares that "really freak[ed] [him] out").

117. See id. at 7 (stating that on cross examination "[Thompson] agreed the best way to describe the basis of his claims is that it is based on a 'continuum of events' from the time he arrived until he stopped driving outside of the wire").
site, which offers assistance to contractors filing insurance claims.\textsuperscript{118} Believing he suffered from Post Traumatic Stress Disorder (PTSD), Thompson filed a claim for workers compensation in 2006, asking, among other things, that KBR pay total disability payments equivalent to his weekly wage in Iraq for the continuing future.\textsuperscript{119}

A central point of contention in the case concerned other sources of stress in Thompson’s life.\textsuperscript{120} A large body of testimony culled from the depositions of medical professionals indicated that Thompson’s conditions might have originated from sources unrelated to his time in Iraq.\textsuperscript{121} Even before he had gone overseas, Thompson had acknowledged that he

\textsuperscript{118} See id. (noting Thompson’s visit to PTSD website). Thompson claimed the first time he heard the term PTSD was during a meeting with a doctor. See id. at 6 (recalling Thompson’s testimony). The “American Contractors in Iraq” website, in its current form, prominently discusses PTSD. See American Contractors in Iraq, http://www.americancontractorsiniraq.com (last visited Oct. 1, 2008) (offering services to contractors). It also contains a warning stating, “PTSD is like CANCER, it’s a hidden injury . . . . Just because you don’t see it doesn’t mean it doesn’t exists, and if not caught TREAT PTSD, don’t let it go undiagnosed.” Id.


\textsuperscript{120} See KBR, 2007-LDA-11 at 21 (outlining contentions of parties). Whereas Thompson presented his claim of work related PTSD, KBR asserted that Thompson “did not suffer any physical harm or injuries . . . . [and] the MMPI-2 suggests Claimant is not suffering from PTSD but is malingering and exaggerating.” Id.

\textsuperscript{121} See. id. at 11-20 (recognizing that Thompson’s mental issues may have arisen from a combination of factors, not simply his experience in Iraq). Thompson was referred to Dr. Lilly in 2005, in part, because he was “upset about child support problems.” See id. at 11 (describing Thompson’s reasons for visiting Dr. Lilly). Dr. Lilly referred Thompson to the Sandhills Center for Mental Health. See id. (discussing Thompson’s mental history). The Sandhills Center reported that Thompson has “child support problems and a lack of means to pay child support” and “feels trapped by his child support demands.” See id. (evaluating Thompson’s mental health). Additionally, Thompson told the Sandhills Center that he “originally went to Iraq because he could not keep up with his child support.” See id. Dr. Ezell Branham, after examining Thompson, believed Thompson’s PTSD was partially attributed to his military service in Germany. See id. at 15-16 (highlighting Dr. Branham’s diagnosis). Thompson told Dr. Griffith that he was not “troubled” by his military service in Germany until he left for Iraq where it “reoccurred.” See id. at 17 (recognizing that mental health issues existed prior to deployment). Dr. Griffith also noted that Thompson was seen in 2004 for “problems which were psychological in nature.” See id.
was under stress resulting from his divorce and bankruptcy.\textsuperscript{122} According to his therapist, Thompson, who had difficulty maintaining his child support, had acknowledged that earning money was the primary reason that he was going overseas.\textsuperscript{123}

Prior to his departure, Thompson had met with a psychiatrist to discuss stress related to the burden of paying child support.\textsuperscript{124} Additionally, Thompson, a veteran of the United States Army had been viciously assaulted when stationed in Germany in the early 1990s.\textsuperscript{125} Thompson later admitted that the event had affected his psyche for many years.\textsuperscript{126} Thompson indicated to his psychiatrists that the assault in Germany continued to haunt him, especially after his return from Iraq.\textsuperscript{127}

Of all the medical professionals Thompson encountered, only one had tried to rule out malingering, which is necessary to the diagnosis of PTSD.\textsuperscript{128} Dr. John Griffith administered the FBS to Thompson after reviewing his inconsistent medical file.\textsuperscript{129} Thompson's score of thirty-two

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\item See id. at 8 (discussing 2004 visit with Dr. Lilly regarding Thompson's financial situation prior to deployment). Dr. Lilly recalled Thompson that was evaluated on a referral for "bad dreams and drinking (flashbacks) and being upset about child support problems." \textit{Id.} at 11. Thompson disputed that those visits had occurred, and claimed any medical record reflecting the visit were "incorrect." \textit{See id.} (noting discrepancy between Thompson's testimony and medical reports). "He also denied telling any physician that the reason he went to Iraq was to be able to pay his child support." \textit{Id.} at 8. Reports also indicated he may have been fired from his position with the City of Greensboro after being questioned about child support payment issues. \textit{See id.} (attributing other problems to child support issues).
\item See id. at 11 (discussing plaintiff's reasons for leaving country). Dr. Lilly reported that "he originally went to Iraq because he could not keep up with his child support payments," and because "there was a lot of money to be made." \textit{Id.} at 8 (noting discrepancy between Thompson's testimony and Dr. Lilly's reports).
\item For discussion of Thompson's clinical visits prior to his departure, see \textit{supra} notes 120-23.
\item See \textit{KBR}, 2007-LDA-11 at 3 (reviewing Thompson's armed service record).
\item See id. at 7 (referencing assault in Germany where Thompson was struck in head). Thompson was attacked with a baseball bat; the event damaged his psyche. \textit{See id.} at 9 (describing assault and subsequent effects).
\item See id. at 24 (recounting report where Thompson told psychiatrist that "his assault in Germany created a great deal of problems for him"). Thompson told Dr. Griffith that this his time in Germany did not trouble him until he went to Iraq, where it "reoccurred." \textit{See id.} at 9 (highlighting Thompson's testimonial account).
\item See id. at 25 (noting that only one doctor conducted malingering testing upon plaintiff). Dr. Griffith testified that the DSM-IV requires "malingering be ruled out for a diagnosis of PTSD when a court proceeding or secondary gain is in issue." \textit{See id.} at 18 (suggesting that other medical professionals who treated Thompson erred by not conducting malingering testing).
\item See id. at 17 (discussing "red flags" in Thompson's file). First, Griffith opined that it is atypical for PTSD patients to "discuss their situation on a regular basis and interact with people where they re-visit the condition." \textit{Id.} Thompson's denial of past psychiatric problems was inconsistent with his visit to Behavioral Associates of Asheboro in 2004 for psychological issues. \textit{See id.} Further, Griffith
\end{enumerate}
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was "practically off the score" and suggested malingering. In Dr. Griffith's opinion, Thompson's claim was motivated by pecuniary gain; the doctor believed that any symptoms of PTSD that Thompson might have experienced did not arise from Thompson's time in Iraq.

B. Judge Dismisses Claimant's "Off the Wall" Claims

The primary issue in S.T. v. KBR was whether Thompson had been injured in the course of employment as required by Section 2(2) of the Workers' Compensation Act (WCA). The Office of Administrative Law Judges considered the testimony of both parties, as well as documentary evidence and post-hearing briefs. This narrative analysis examines the testimony that "the hallmark feature of PTSD is the traumatic event" and "[t]here is no such this as cumulative PTSD." Id. (doubting Thompson's claim of "cumulative PTSD"). In Griffith's opinion, the smells that Thompson reported had triggered his PTSD were "not sufficient." See id. at 18 (discussing inconsistencies in Thompson's file). Griffith noted that Thompson had gained weight in Iraq, whereas most "patients with depression or under stress frequently lose weight." Id. Dr. Griffith also indicated it is unusual for someone with PTSD to "inform[ ] bystanders" about their stress because PTSD patients are usually "ashamed and do[ ] not want others to know about their condition." Id. Thompson also did not exhibit "disorder, disorientation, memory loss, delusions or hallucinations and was considered not psychotic or brain damaged." Id. Lastly, Dr. Griffith deposed that, though repetitive dreams are "concrete," they "do not 'count' as a bona fide symptom of PTSD." See id. Dr. Griffith did not rule out the possibility that Thompson had "legitimate problems," but opined it was unlikely they resulted from his employment in Iraq. See id. at 19 (recognizing that diagnosis dismissing PTSD does not indicate individual is free from mental disorder). In fact, Dr. Griffith suggested Thompson "may benefit from some therapy." See id. (stating further treatment may be appropriate).

130. See id. (discussing FBS results). The FBS results were "practically off the score," indicating that Thompson was malingering. See id. A second opinion of the MMPI-2 results also supported "a finding of malingering symptom magnification." Id. Dr. Griffith did not base his conclusion of malingering solely on the FBS score; rather, the weight of evidence, coupled with the FBS results, informed that conclusion. See id. at 28 (affirming that FBS is not sole tool in detecting malingering, but acts as supplement to affirm findings). The weight of the evidence, coupled with the FBS results, led him to his conclusion. See id. (reiterating that FBS is one of several "validity indices").

131. See id. at 19 (discussing Dr. Griffith's findings).

132. See Workers' Compensation Act, 33 U.S.C. § 920 (2007) (describing requirements in Workers' Compensation cases). Section 2(2) of the Workers' Compensation Act (WCA) "defines 'injury' as 'accidental injury or death arising out of or in the course of employment.'" See KBR, 2007-LDA-11 at 22 (reciting Workers' Compensation Act). Section 20(a) of the act requires a presumption favorable to the claimant. See id. (same). Section 20 (a) of the WCA states:

In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in absence of substantial evidence to the contrary—that the claim comes within the provisions of this Act. Id. at 22 (quoting 33 U.S.C. § 920(a)).

133. See KBR, 2007-LDA-11 at 2 (listing proffered evidence). For discussion of the case facts and the evidence presented by both parties, see supra notes 106-31 and accompanying text.
court’s interpretation of the evidence proffered to determine if such an injury occurred, including the FBS.134

Judge Lee Romero, Jr. prefaced his analysis by noting that the WCA requires plaintiffs to show through affirmative proof that “(1) [the plaintiff] sustained physical or psychological harm or pain, and (2) . . . conditions existed at work, which could have caused the harm or pain.”135 In his discussion of the claimant’s credibility, Judge Romero began by noting the Claimant’s “questionable” credibility.136 The decision highlighted the conflicting reports in Thompson’s testimony and medical history.137 Judge Romero conceded that Thompson was “undoubtedly exposed to traumas,” but found that “[Thompson’s] embellishment and outright fabrication of events to enhance his exposure” undermined Thompson’s credibility.138 Though Thompson visited a variety of medical professionals, Judge Romero was “impressed” by Dr. Griffith’s testimony.139 Because Dr. Griffith attempted to rule out malingering, as required by the DSM-IV, Judge Romero found his opinion “more probative, reasoned and explicated” than any other reporting clinician or physician involved in the matter.140

134. For discussion of the facts of S.T. v. KBR, see supra notes 106-31 and accompanying text.

135. See KBR, 2007-LDA-11 at 22 (outlining elements of prima facie case). Judge Romero also prefaced his analysis with section one, entitled “Post-Traumatic Stress Disorder (PTSD).” See id. at 23 (discussing elements of PTSD). In this section, Judge Romero defined PTSD. See id. (defining PTSD). Judge Romero acknowledged that traumatic events can include “witnessed events.” See id. (describing PTSD). He concluded the section by stating that “[a] differential diagnosis requires that malingering be ruled out in those situations in which financial remunerations, benefits eligibility and forensic determinations play a role.” See id. (acknowledging importance of malingering testing amongst compensation seekers).

136. See id. (stating “[Thompson’s] credibility in this matter is questionable”).

137. See id. at 28 (discussing inconsistencies and contradictions in Thompson’s testimony). Thompson told Dr. Branham that his assault while enlisted in the Army “created a great deal of problems for him and he was having difficulty with dreams about the assault,” but he provided contradicting history of the assault to Dr. Griffith. See id. at 24 (same). Thompson also told Dr. Branham that a “kidney stone episode” brought back experiences from his early 1990s military service. See id. (same). Thompson also denied he visited with Dr. Lilly in 2004, despite medical records indicating otherwise. See id. (same).

138. See id. (discussing Judge Romero’s reasons for hesitating to believe Thompson). Because of the inconsistencies in the record, Judge Romero stated he was “generally not impressed with [Thompson’s] efforts to exaggerate his exposure to alleged trauma in Iraq.” See id. (same).

139. See id. at 25 (highlighting Judge Romero’s acceptance of Dr. Griffith’s testimony). Judge Romero described Dr. Griffith as an accepted expert and someone who was “highly credentialed and has held numerous academic positions.” Id. Judge Romero noted Dr. Griffith’s experience in over 100 PTSD cases also contributed to his legitimacy. See id. (highlighting Dr. Griffith’s experience). Dr. Griffith’s opinions were given “within reasonable medical probability based on his interview of Thompson, a review of the medical records he provided, and independent diagnostic testing.” See id. (discussing Dr. Griffith’s methodology).

140. See id. (supporting Dr. Griffith’s methodology).
In evaluating Thompson’s prima facie case, Judge Romero found that Thompson’s exposure to trauma supported a “presumptive prima facie case,” but concluded that the weight of the evidence rebutted Thompson’s prima facie case. Under applicable administrative law, if the presumption of the prima facie case is rebutted, the judge “must weigh all of the evidence and resolve the causation issue based on the record as a whole.” Judge Romero, in analyzing “all the evidence,” relied primarily on Dr. Griffith’s testimony highlighting the FBS.

Judge Romero recognized that inconsistencies in Thompson’s case made MMPI-2 testing and the FBS relevant. The analysis of Thompson’s MMPI-2 score “contained indications of considerable dramatization [and] exaggerating.” Judge Romero specifically mentioned Thompson’s FBS score of thirty-two and cited a report stating “‘scores of thirty or more are extremely rare among patients not in litigation.’” Though Judge Romero recognized the FBS should not be “relied upon in isolation,” he nevertheless regarded the FBS score as particularly valuable in conjunction with other evidence.

Judge Romero relied upon Dr. Griffith’s opinion more than other professionals because the expert opinion was “based upon both subjective and objective criteria.” Dr. Griffith’s use of the MMPI-2 testing and the FBS combined to created a “reasoned” analysis, whereas others only used

141. See id. (weighing all evidence). Judge Romero referenced the attacks on Thompson’s vehicle, recovery missions, and diagnoses of medical professionals as sufficient evidence of the necessary physical or psychological harm element of a prima facie case. See id. at 25-26 (establishing that plaintiff suffered harm prior to last day of work).

142. See id. at 28 (discussing administrative law standards).

143. See id. (weighing all evidence). Judge Romero devoted an entire paragraph to MMPI-2 and FBS testing. See id. (discussing FBS and subsequent testing verifying results). Further, nearly all of Judge Romero’s analysis related to Dr. Griffith’s testimony. See id. at 28-29 (weighing all evidence). Judge Romero again noted that Dr. Griffith was the only physician or clinician to perform any objective testing. See id. (distinguishing Dr. Griffith from other clinicians). Because the DSM-IV requires testing of malingering before a diagnosis of PTSD, Judge Romero valued the FBS analysis. See id. at 29 (stating that Dr. Griffith’s criteria was “more reasoned and probative”).

144. See id. at 28 (noting that Thompson’s profile contained “indications of considerable dramatization, exaggeration, or faking”). The FBS score further verified Thompson was malingering. See id. (discussing Thompson’s high FBS score).

145. See id. (discussing analysis of FBS score).

146. See id. (citing Dr. Rubenzer’s report which analyzed Thompson’s FBS test). Dr. Rubenzer stated that Thompson’s behavior could not “be taken at face value.” See id. (describing FBS conclusions).

147. See id. (discussing FBS conclusions along with other evidence). Judge Romero determined “the record as a whole support[ed] Dr. Griffith’s conclusion and opinion that Claimant was malingering and [did] not suffer from PTSD or any other work-related psychological condition.” See id. at 29 (implying that FBS was not sole reason for dismissing case).

148. See id. (noting indicia of reliability in Dr. Griffith’s testimony).
Judge Romero concluded that "the record as a whole supports Dr. Griffith's conclusion and opinion that [Thompson] was malingering." Therefore, in weighing "the record as a whole," Judge Romero determined Thompson did not satisfy his burden of proof that he suffered from PTSD "or any other psychological condition as a result of his employment" with KBR. Thus, Thompson's claim was held to be without merit and was dismissed.

V. "EASE ON DOWN THE ROAD": WHAT DOES S.T. v. KBR MEAN FOR THE FBS?

Judge Romero's reliance on the FBS in S.T. v. KBR acts as a warning sign for malingering plaintiffs. Though an administrative court's analysis of expert witnesses and testimony differs from common law civil courts, the methodology readily translates. Further, Judge Romero's analysis of Dr. Griffith's expert testimony is an important indicator that the FBS, if subject to Frye and Daubert motions, will be admissible in court. If this holds true, defendants can rest assured knowing that a reliable source is available to root out malingering plaintiffs.

Plaintiff's lawyers argue that the FBS has no place in our legal system. Though S.T. v. KBR is one of the only cases, if not the only case, to heavily rely on the FBS in reaching a judicial opinion, the FBS has been cited in other cases. Thus, despite its relative youth, recent decisions

149. See id. at 28-29 (comparing Dr. Griffith's methodology to that of other clinicians).
150. Id. at 29. For discussion of the weight of evidence, see supra notes 106-31 and accompanying text.
151. See id. (citing Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267 (1994)). Greenwich held that when a presumption of a prima facie case under Section 20 of the Workers' Compensation Act is successfully rebutted, an administrative law judge can dismiss the case. See Greenwich, 512 U.S. at 280 (discussing case holding).
152. See KBR, 2007-LDA-11 at 29 (dismissing Thompson's claim).
153. For discussion of the facts and holding of S.T. v. KBR, see supra notes 106-31 and accompanying text.
154. See KBR, 2007-LDA-11 at 1-29 (discussing standards used in administrative law). Conversely, expert testimony is governed by Frye and Daubert. See, e.g., Pennuto, supra note 52, 368-74 (outlining evidentiary standards for expert testimony in both Frye and Daubert jurisdictions). Judge Romero's analysis, however, considered many of the factors relevant in both Frye and Daubert. See KBR, 2007-LDA-11 at 1-29. (discussing reasons for dismissing claimant's case).
155. For discussion of FBS as related to the standards for expert witnesses in Daubert and Frye, see infra notes 161-209 and accompanying test.
156. For discussion of the impact of S.T. v. KBR, see infra notes 210-18 and accompanying text.
157. For a discussion of the criticisms of FBS, see supra notes 73-76 and accompanying text.
158. See, e.g., Reiner v. Warren Resort Hotels, Inc., No. 06-173-M-DWM, 2008 WL 5120682, at *14, (D. Mont. Oct. 1, 2008) (recognizing FBS and FBS test results as "valid"). The court considered Plaintiff's contentions highlighting the controversy around the FBS, but determined that expert testimony regarding the FBS,
illustrate a willingness to allow the FBS in court.\textsuperscript{159} Additionally, the FBS carries the endorsement of the MMPI, which brings instant credibility in court.\textsuperscript{160}

A. "Give in to Me": FBS Under Frye and Daubert

Presumably, the FBS will be introduced with expert testimony.\textsuperscript{161} Expert testimony is governed by Federal Rule of Evidence 702, which has a fairly liberal admissibility requirement.\textsuperscript{162} Though states are not bound by


159. For a discussion of the development of the FBS, see supra notes 71-105 and accompanying text.

160. See Armstrong, supra note 4 (noting MMPI approval of FBS). Further, the MMPI has passed Daubert motions. See, e.g., Chrissafis v. Continental Airlines, No. 95 C 5080, 1997 WL 534874, at *4 (N.D. Ill. Aug. 21, 1997) (stating that "it appears that the MMPI-2 satisfies the requirements of Daubert"); see also Pennuto, supra note 52, at 375 ("Challenges to the admissibility of the MMPI-2 will rarely prove successful, however, as the MMPI-2 fares well against Daubert's four criteria due to the development and research literature of the MMPI-2.").


federal rules, many states employ either Frye or Daubert standards. Although a thorough analysis of the intricacies in Frye and Daubert is outside the purview of this Note, a general application of these tests is necessary.

Frye simply requires that the science presented in court be "generally accepted" by the relevant scientific community. One commentator suggests this means use must be "widespread, prevalent, extensive though not universal." The general acceptance test, however, created a confusing and convoluted body of law and in response, Congress adopted the Federal Rules of Evidence, which were considered even more liberal than the Frye standard.

In Daubert, which rejected the Frye standard at the federal level, the court envisioned judges as "gatekeepers" who had the power to ensure the reliability of testimony, and thus created a more stringent standard than Frye or Federal Rule of Evidence 702. Daubert calls for a two pronged

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163. See Pennuto, supra note 52, at 373 ("Although state courts are not bound by the federal rules, most states follow either the Federal Rules of Evidence or the Frye test [or] a variation of the Daubert or Frye test.") (footnote omitted).

164. For an application of Frye and Daubert to the FBS, see infra notes 176-209 and accompanying text.

165. See Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923) (discussing standard of admissibility of expert testimony). Frye requires that the science in question be "sufficiently established to have gained general acceptance in the particular field in which it belongs." Id. Frye required that "the technique underlying scientific evidence must be generally accepted by the scientific community to be eligible for admissibility [and] [e]xpert opinion based on methodology diverging from authoritatively recognized practices in the field could not be accepted as reliable." Friedland, supra note 3, at 346 (discussing evidentiary standard in Frye). Frye initially "applied only to the admissibility of polygraph evidence, but was expanded by courts to apply to all novel scientific evidence." Id.


167. See Browne & Harrison-Spoerl, supra note 162, at 1143 (noting that "confusion precipitated by the Frye standard was remarkable," thus leading to creation of Federal Rules of Evidence). The Federal Rules of Evidence "specifically addressed the admissibility of expert testimony" and "eliminate[ed] some of the barriers to the admission of expert testimony." Id. at 1144; see also Saccuzzo, supra note 52, at 385 (stating that "Supreme Court finally resolved the F.R.E./Frye controversy in 1993 in Daubert.")

168. See Jessica D. Gabel & Margaret D. Wilkinson, Good Science Gone Bad: How the Criminal Justice System Can Redress the Impact of Flawed Forensics, 59 HASTINGS L.J. 1001, 1002 (2008) (discussing "gatekeeper" function in Daubert). Daubert requires the "judge act[ ] as a 'gatekeeper' and may admit scientific evidence as long as it is both 'relevant' and 'reliable.'" Id. In Daubert, the Court stated "the Frye test was superseded by the adoption of the Federal Rules of Evidence" and thus a new standard was needed. See Daubert v. Merrell Dow Pharmas., 509 U.S. 579, 587
analysis under Rule 702. In the first prong, judges must evaluate whether the testimony is “relevant to the task at hand.” In the second prong, the reliability inquiry, the judge must determine if the testimony reflects “scientific knowledge . . . derived by the scientific method.”

The court did not create a “definitive checklist or test”; rather, the court cited several factors for judges to consider when determining if the expert testimony is admissible under Federal Rule of Evidence 702, including: (1) “whether the theory can be (and has been) tested”; (2) “whether it has been subjected to peer review and publication”; (3) “the known or potential error rate”; and (4) “whether it has gained widespread acceptance within a relevant scientific community.”

The FBS likely passes evidentiary muster under an application of the Daubert, Frye, and Federal Rule of Evidence 702 factors. The list of Daubert factors is not “exhaustive” and does not require completion of all four factors. The FBS however, goes above and beyond, satisfying all four factors.

Under the first nonexclusive factor of Daubert, the methodology must be “testable.” As previously mentioned, the FBS was subject to over twenty years of scientific testing in academia. The FBS’s criterion test-
ing methodology is "testable" and subject to further analysis.\textsuperscript{178} Tests have analyzed the FBS across a wide variety of settings including PTSD victims, compensation-seeking litigation, and workplace injuries.\textsuperscript{179} Nearly all of these scales support the validity of the FBS.\textsuperscript{180} Tests criticizing the FBS were challenged as erroneous, particularly amongst the groups FBS was designed to test.\textsuperscript{181} Additionally, the MMPI-2, which incorporates the FBS, usually passes this part of a \textit{Daubert} motion, although "as judges may lack the technical knowledge to assess MMPI-2 evidence, decisions of admissibility are not as predictable."\textsuperscript{182} While the FBS, on its own, has a sufficient body to support its use, "[t]he MMPI and MMPI-2 have been the subject of literally thousands of psychological research studies, many of which are reported in peer-reviewed journals."\textsuperscript{183} When FBS testing is considered in conjunction with MMPI testing, the FBS clearly fulfills the first criterion suggested in \textit{Daubert}.\textsuperscript{184}

\textit{Daubert}'s second criterion is that the testing must peer reviewed and published.\textsuperscript{185} Testing of the FBS appears in nearly a dozen psychological journals.\textsuperscript{186} Though FBS testing appears in fewer journals than MMPI

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\item[178.] For a discussion of criterion testing of FBS, see \textit{supra} note 54 and accompanying text.
\item[179.] See, e.g., Crawford et al., \textit{supra} note 8, at 217-21 (finding that FBS was only MMPI measure that produced significant correlation with respect to malingering and workplace injuries); Greiffenstein, \textit{supra} note 78, at 1591-92 (recognizing FBS's success in detecting malingering among compensation-seeking litigants); Nelson et al., \textit{supra} note 77, at 1-12 (recognizing FBS' effectiveness in spotting feigned PTSD).
\item[180.] For a discussion of peer reviewed testing of FBS, see \textit{supra} notes 71-105 and accompanying text.
\item[181.] See Armstrong, \textit{supra} note 4 (discussing responses to studies criticizing FBS). For a discussion of tests criticizing FBS, see \textit{supra} notes 72-75 and accompanying text.
\item[182.] See Pennuto, \textit{supra} note 52, at 375 (noting that MMPI is still not one hundred percent understood in court); \textit{see also} Chrissafis \textit{v. Continental Airlines}, No. 95 C 5080, 1997 WL 534874, at *4 (N.D. Ill. Aug. 21, 1997) (stating that "it appears that the MMPI-2 satisfies the requirements of \textit{Daubert}").
\item[183.] See Brief for Defendant at *6, Stokes \textit{v. Xerox Corp}, No. 05-71683, 2008 WL 275672 (E.D. Mich. Jan. 28, 2008) (discussing amount of review given to FBS); \textit{see also} Pennuto, \textit{supra} note 52, at 356 (stating "[t]housands of research studies have been performed on the MMPI-2 measure itself").
\item[184.] For discussion of the first criterion of \textit{Daubert}, see \textit{supra} notes 176-83 and accompanying text.
\item[185.] See Daubert \textit{v. Merrell Dow Pharms.}, 509 U.S. 579, 593 (1993) (stating that "[a]nother pertinent consideration is whether the theory or technique has been subjected to peer review and publication"). According to \textit{Daubert}, peer review means "that a given study, methodology, or result will be, in most cases, more reliable than unpublished studies." Matthew W. Swinehart, Note, \textit{Remediying Daubert's Inadequacy in Evaluating the Admissibility of Scientific Models Used in Environmental-Tort Litigation}, 86 Tex. L. Rev. 1281, 1306 (2008). The peer review requirement "bridge[s] the competency divide between the scientific and legal realms . . . by relying in part on peer review to vet potential expert-witness testimony." \textit{Id.}
\item[186.] See Brief for Defendant \textit{supra} note 183, at *6 (explaining peer reviewed studies of FBS).
\end{enumerate}
testing, this is likely attributed to the relative novelty of the test. Daubert states,

[s]ome propositions, moreover, are too particular, too new, or of too limited interest to be published. But submission to the scrutiny of the scientific community is a component of 'good science,' in part because it increases the likelihood that substantive flaws in methodology will be detected. In accordance with this criterion, the FBS was subjected to methodology designed to detect such flaws, and outlined in a variety of publications.

The third non-exclusive factor in Daubert calls for a known rate of error. In his initial FBS study, Dr. Lees-Haley determined that an FBS score of twenty correctly "classified 96% of personal injury claimants diagnosed as malingering emotional distress as malingerers and ... 90%, of personal injury claimants diagnosed as presenting genuine injuries as nonmalingerers." One study was designed to gather error rate information subjected the FBS to a validity index. The data showed that "[i]n a group of knowledgeable actors (malingerers), 86% [were] correctly classified." The FBS contains a very low error rate, but not even a high error rate could successfully eliminate the admissibility of the FBS under Daubert.

The fourth and final Daubert criterion calls for "general acceptance," which is also the lone requirement in Frye. Thus, if the FBS satisfies this

187. Compare Armstrong, supra note 4 (noting novelty of FBS), with Pennuto, supra note 52, at 356 (stating that "[t]housands of research studies have been performed on the MMPI-2 measure itself").

188. Daubert, 509 U.S. at 593-94 (discussing need for peer reviewed testing).

189. For a discussion of FBS testing in peer reviewed journals, see supra notes 71-105 and accompanying text.

190. See Daubert, 509 U.S. at 594 ("Additionally, in the case of a particular scientific technique, the court ordinarily should consider the known or potential rate of error."). In Daubert's third factor, courts can "choose to admit only models that succeeded in meeting a certain minimum degree 'fit' with reality." Swinehart, supra note 185, at 1308. An error rate, however, can "never be absolutely accurate and will have some nonzero rate of error." Id.

191. Meyers et al., supra note 31, at 157-69 (discussing error rate in initial study of FBS).

192. See generally id. (creating validity index for MMPI-2 scales including FBS). The validity index the author used to study the FBS "has been studied with many different samples and conditions" including both "fake bad (exaggerated impairment)" and "fake good (trying to appear as not having any emotional distress or problems)" scales. See id. at 158 (noting effectiveness of validity index used to analyze FBS).

193. Id. at 157 (discussing study results).

194. See, e.g., United States v. Bonds, 12 F.3d 540, 560 (6th Cir. 1993) (stating that "error rate is only one in a list of nonexclusive factors that the Daubert court observed would bear on the admissibility question").

195. See Daubert, 509 U.S. at 594-95 (stating "general acceptance" is relevant to the expert inquiry). Daubert keeps Frye's general acceptance test relevant:
prong, it succeeds under both the *Frye* and *Daubert* tests. At least eleven articles support the use of FBS. The *Wall Street Journal* noted that "the Fake Bad Scale has been used by 75% of neuropsychologists, who regularly appear in court as expert witnesses." The same study cited by the *Wall Street Journal* further opines that forty-three percent of psychologists "always use" the FBS. The study states "the results of this current study indicate frequently used measures [like the FBS] . . . would all meet *Frye* standards for admissibility as approximately three-quarters of the sample surveyed stated that they used these measures to detect suboptimal effort." Further, the MMPI-2, which endorses the FBS, "is the most researched psychological assessment administered." The MMPI has been subject to thousands of research studies and is "by far, common of all the psychological assessments employed." Thus, in fulfilling the fourth factor, the general acceptance is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence, but the Rules of Evidence—especially Rule 702—do assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands.

Id.

196. See *id.* at 594 (discussing general acceptance criterion). Although *Frye* requires "general acceptance" and *Daubert* does not, *Daubert* holds that general acceptance "can yet have a bearing on the inquiry." See *id.* (recognizing value in general acceptance inquiry). Though none of *Daubert*’s four factors are singularly determinative, some states have indicated that "even under the *Daubert* standard . . . the general acceptance inquiry of *Frye* may be considered determinative . . . [because the Court’s] philosophy is that, if a scientific technique has achieved general acceptance in the relevant scientific community, no further inquiry under the *Daubert* standard is necessary." *Jensen,* supra note 17, at 1616 (discussing importance of "general acceptance" factor) (footnote omitted). Further, other states using *Daubert* criteria "appear to give great weight to the general acceptance standard of *Frye* even if they do not consider it determinative. *Id.* at 1617.


199. See generally Sharland & Gfeller, *supra* note 72, at 213-23 (referencing same study cited by *Wall Street Journal*, stating that FBS is regularly used by practicing clinicians); see also *Reiner v. Warren Resort Hotels, Inc.*, No. 06-173-M-DWM, 2008 WL 5120682, at *15, (D. Mont. Oct. 1, 2008) (stating that FBS is "recognized as valid within the neuropsychology profession" and is not "so unreliable that the Court should exclude any opinion testimony relying on them").

200. See Sharland & Gfeller, *supra* note 72, at 221 (predicting FBS will survive *Frye* motions); see also Pennuto, *supra* note 52, at 354 (discussing frequent studies done to MMPI).

201. See *id.* at 356 (stating MMPI-2 "has been used in over ten thousand research studies" and that "[m]any studies involve the use of the MMPI-2 as a personality assessment measure"). Further, the MMPI itself has been the subject of "thousands of research studies." See *id.* (recognizing large body of MMPI-2 testing).

202. See *id.* at 353 (noting general acceptance of MMPI-2).
FBS satisfies both *Frye* and *Daubert*. Because Dr. Griffith was clearly qualified as an expert, and based upon his credentials which were mentioned on the record, if the same factual scenario had occurred in a different court using *Frye* or *Daubert*, the same evidence would likely be allowed.

This is not to say that defendants such as KBR automatically win their cases if FBS evidence is introduced. As previously mentioned, the FBS is not a substitute for the adversarial process, and *Daubert* and its progeny still allow for judicial tactics by plaintiffs. In *Daubert*, the Supreme Court stated that “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.” Even if plaintiff’s lawyers find that this evidence is “shaky,” the case is not all lost. *Daubert* envisioned judges only as “gatekeepers,” but cases will still be decided by the trier of fact.

VI. IMPACT

Most scholarship regarding the FBS, both in and out of the legal world, is written by those who already have a financial stake in the matter. Dr. Lees-Haley, the creator of the FBS, works as an expert witness and charges $600 per hour as an expert witness.

203. For a discussion of FBS under *Frye* and *Daubert* standards, see supra notes 161-202 and accompanying text.


205. See Daubert v. Merrell Dow Pharms., 509 U.S. 579, 596 (1993) (noting that “shaky but admissible evidence”, such as expert testimony, can be overcome by “[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof”).

206. See id. (noting that expert evidence is still weighed by trier of fact). *Daubert* states if the trial court determines “that the scintilla of evidence presented supporting a position is insufficient to allow a reasonable juror to conclude that the position more likely than not is true, the court remains free to direct a judgment . . . [or] grant summary judgment.” *Id.* (discussing judicial remedies for unreliable expert evidence).

207. *Id.* (noting alternatives for parties challenging evidence).

208. See *id.* (stating that respondent was “overly pessimistic” because tactics still exist to contradict “shaky but admissible evidence”).

209. See *id.* at 580 (explaining that goal of *Daubert* is to “assist the trier of fact to understand the evidence or to determine the fact in issue”); see also, e.g., Reiner v. Warren Resort Hotels, Inc., No. 06-173-M-DWM, 2008 WL 5120682, at *15 (D. Mont. Oct. 1, 2008) (noting that plaintiff’s objections to FBS relate to “the weight, and not the admissibility” of evidence).

210. See, e.g., Armstrong, supra note 4 (stating that working with litigants is Lees-Haley’s “main source of income”). Lees-Haley charges $600 per hour as an expert witness. See Scheffey, supra note 10, at 3 (discussing Lees-Haley’s salary). Dorothy Sims, who authored of a number of pieces criticizing FBS, and is a self proclaimed “expert” on the FBS, is a Florida-barred plaintiff’s attorney. See *id.*
for large corporations like KBR. Thus, if the FBS is deemed legitimate in court, he serves to profit from it. Conversely, of the several articles available in legal journals criticizing the FBS, nearly all are penned by plaintiff’s attorneys, who certainly have a financial interest in seeing the FBS discredited.

Despite competing motivations, the FBS is well grounded in empirical evidence, and further, the MMPI’s endorsement of the FBS should act as a seal of approval in the legal world. The authors of the MMPI, who shared many of the courts’ concerns regarding the efficiency of the test, added the test to the approved materials following expert evaluations. The MMPI authors were correct to recognize the FBS is not a “truth serum” or a judicial cure-all. The FBS is simply one tool, when used in conjunction with others, that helps to determine whether a plaintiff is faking or exaggerating; the court in S.T. v. KBR recognized this utility.

Thus, because the FBS can assist the trier of fact, and passes Frye and Daubert standards, it has a place in our courtrooms.

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