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# BUSINESS LITIGATION

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# Getting the 'Drift': Maryland Adopts *Daubert* Standard

## ABOUT THE AUTHORS

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Maryland, the "Old Line State," knows a thing or two about holding the line. The stalwart regiments of Maryland regulars known as the Old Line fought bravely during the American Revolution's first major engagement, the Battle of Long Island.[1] But no line can or should be held forever. So it was that on August 28, 2020, 244 years and one day after the Old Line stood its ground, the Court of Appeals of Maryland[2] finally gave up its rearguard action against the *Daubert* standard for the admissibility of expert testimony.

The 4-3 decision came in *Rochkind v. Stevenson*.[3] *Stevenson II* ended Maryland's use of the century-old *Frye-Reed* general-acceptance standard in favor of the relevance/reliability standard first enunciated by the Supreme Court of the United States in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[4] Maryland is now the fortieth state to adopt *Daubert*.

Maryland trial courts have too often abdicated their role as gatekeepers whose job it is to prevent juries from hearing "junk science." This was due in no small part to *Frye-Reed*, which asked only whether the theory underlying an expert's testimony had been "sufficiently established to have gained general acceptance in the particular field in which it belongs."[5] This standard resulted in consistent "complacency … due to the ability of a later court to take judicial notice of a methodology's general acceptance."[6] *Frye-Reed* was thus subject to criticism because it "exclude[d] scientifically reliable evidence which is not yet generally accepted, …admit[ted] scientifically unreliable evidence which although generally accepted, cannot meet rigorous scientific scrutiny,"[7] and "excused the court from even having to try to understand the evidence at issue."[8] *Daubert*, which held that Federal Rule of Evidence 702 superseded *Frye*, developed a non-exclusive list of factors that federal trial courts were to vigorously use in making threshold determinations that "scientific testimony" was "not only relevant, but reliable."[9] In adopting *Daubert*, Maryland's Court of Appeals has now

[1] The Maryland Line earned its reputation covering the retreat of the Continental Army, and saving it from annihilation. General George Washington is said to have referred to the "old line" as providing an "hour more precious to American liberty than any other." R. Polk, Holding the Line: The Origin of the Old Line State. http://aomol.msa.maryland.gov/html/oldline.html (last visited: Sept. 1, 2020).

[2] The Court of Appeals is Maryland's highest court. Though its name would imply otherwise, the Court of Special Appeals is Maryland's intermediate appellate court.

[3] __ Md. __, slip op., No. 47, Sept. Term, 2019 ("*Stevenson II*").

[4] 509 U.S. 579 (1993).

[5] *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923) (adopted by *Reed v. State*, 283 Md. 374 (1978); hence, "*Frye-Reed*").

[6] *Stevenson II*, slip op. at 38 n.16.

[7] *Id.*, slip op. at 32 (quoting *State v. Coon*, 974 P.2d 386, 393-94 (Alaska 1999)).

[8] *Id.*, slip op. at 31 (quoting *United States v. Horn*, 185 F. Supp. 2d 530, 553 (D. Md. 2002)).

[9] *Daubert*, 509 U.S. at 589. Though *Daubert* concerned only "scientific testimony," the Supreme Court later extended it to testimony based on

"task[ed] trial courts with analyzing the reliability of testimony…, without the notion that because a court has accepted it before, it shall be accepted again."[10]

What prompted this change was the frustrating, decade-long case of Starlena Stevenson, a young woman with a family history of learning disabilities, and diagnoses of ADHD and "several major psychological disorders."[11] In 2011, she sued her former landlord, alleging that her exposure to lead paint in one of his properties nineteen years earlier had caused her injuries. The trial court repeatedly rebuffed the defendant's efforts to challenge the plaintiff's proof of general and specific causation. When all was said and done, confusion (or obstinacy) over the admissibility of a pediatrician's testimony had resulted in a trial, three retrials on causation and damages (the second of which resulted in a mistrial), and three appellate opinions.[12]

Though the Court of Appeals took pains to characterize its decision as incremental and largely owing to "jurisprudential drift,"[13] *Stevenson II* should have several immediate impacts. First, trial courts will no longer have to deal with two oft-competing standards. While *Frye-Reed* asked whether a theory is generally accepted, Maryland Rule 5-702, an evidentiary rule adopted in the wake of *Daubert* but "not intended to overrule" *Frye-Reed*,[14] requires that an expert be qualified, the testimony be "appropriate[ ]," and the factual basis supporting the expert testimony be "sufficient."[15] The relationship between these two standards was "not so simple," particularly where "'the underlying data and methods for gathering this data are generally accepted in the scientific community but [are] applied to support a novel theory.'"[16] As scientific advances accelerated, this relationship grew increasingly fraught.

Now, instead of determining whether an expert's testimony is generally accepted and has a sufficient factual basis, courts will have to determine, per *Daubert*, whether the testimony is relevant and reliable. To do this, they will be charged to consider some or all of the following now-familiar factors: (1) whether a theory or technique can be (and has been) tested; (2) whether a theory or technique has been subjected to peer review and publication; (3) whether a particular technique has a known or potential rate of error; (4) the existence and maintenance of standards and controls; (5) whether a theory or technique is generally accepted; (6)

'technical' and 'other specialized' knowledge." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

[10] *Stevenson II*, slip op. at 38 n.16.

[11] *Id.*, slip op. at 2-3.

[12] *See Rochkind v. Stevenson*, 454 Md. 277 (2017) ("*Stevenson I*"), rev'g *Rochkind v. Stevenson*, 229 Md. App. 422 (2016). The complex case history is discussed in *Stevenson II*, slip op. at 2-8, and *Stevenson I*, 454 Md. at 281-84.

[13] *Stevenson II*, slip op. at 25 (quoting *Savage v. State*, 455 Md. 138, 186 (2017)); *see generally*, *id.*, slip op. at 14-24 (tracing the 'drift').

[14] Comm. Note to Md. Rule 5-702; *see Stevenson II*, slip op. at 20-21.

[15] Md. R. 5-702.

[16] *Stevenson II*, slip op. at 10 (quoting *Blackwell v. Wyeth*, 408 Md. 575, 596 (2009)).

whether the expert is proposing to testify about matters growing naturally and directly out of research the expert conducted apart from the litigation, or whether the expert developed the opinions principally for purposes of testifying; (7) whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion; (8) whether the expert has adequately accounted for obvious alternative explanations; (9) whether the expert is being as careful as the expert would be in the expert's regular professional work outside paid litigation work; and (10) whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give.[17]

*Stevenson II* also provides practical assistance for expert challenges. The Court of Appeals held that the trial court had abused its discretion in refusing the defendant's request for an opportunity, pretrial, to make the opposing expert explain the challenged testimony under oath and subject to cross-examination. "When the court denied the motion for a pretrial hearing, [the defendant] was compelled to challenge Dr. Hall-Carrington's methodology in front of the jury. This placed [the defendant] in exactly the situation a pretrial hearing is designed to prevent."[18] Defendants wishing to challenge the relevance or reliability of opposing expert testimony before trial now have helpful, express authority from Maryland's highest court.

Finally, we should not overlook the twenty-plus years of *Daubert* caselaw that is now available to practitioners in Maryland courts. Even if *Daubert* had influenced its adoption, the Rules Committee's express statement that Maryland Rule 5-702 was not intended to overrule *Frye-Reed* limited the utility of federal caselaw in Maryland courts and engendered confusion. In adopting *Daubert*, the Court of Appeals acknowledged, and addressed, this confusion.[19]

[17] *Id.*, slip op. at 35-36.

[18] *Id.*, slip op. at 26 (citing *Blackwell*, 408 Md. at 591, 594 n.13 (describing pre-trial evidentiary hearing contemplated under Maryland law to challenge expert testimony and reasons for hearing); *Savage*, 455 Md. at 170 ("An expert should not be expected to connect the dots before a jury.")).

[19] *Id.*, slip op. at 29 ("this Court's jurisprudence has implicitly embraced portions of the *Daubert* standard in the *Frye-Reed* analysis without expressly stating that fact. … Recognizing our "drift," we agree … that retaining a *Frye-Reed* standard, yet encouraging trial courts to seek guidance from federal cases applying the *Daubert* standard, may generate some confusion. The impetus behind our decision to adopt *Daubert* is our desire to refine the analytical focus ….")

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