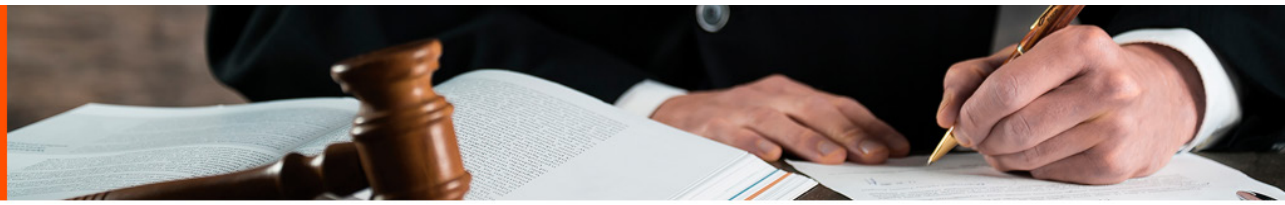

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From the Editor

The Thin Grey Line (Between Rules 701 and 702)

By Patrick J. Kenny

An issue concerning experts that receives far fewer headlines than traditional *Daubert* decisions is the occasionally grey line between lay opinion and expert opinion from a percipient witness who also happens to be qualified under Rule 702. If not managed properly, the testimony from these so-called "dual-role" experts can slip through the cracks between Rules 701 and 702 and create otherwise avoidable risks of error, as was discussed in some detail in *United States v. Overton*, No. 19-2574, 2020 WL 4809914 (8th Cir. Aug. 19, 2020).

The dual-role witness in *Overton* was a law enforcement officer whose testimony provided interpretations of recorded telephone calls and text messages involving a defendant charged with an array of drug-related crimes. Under Rule 701 the officer could provide opinion testimony as a percipient witness "if it is 'rationally based on the witness's perception,' 'helpful to clearly understanding the witness's testimony or to determining a fact in issue,' and '*not based on scientific, technical, or other specialized knowledge*.'" *Id.* at *2 (quoting Fed. R. Evid. 701) (emphasis added). However, to the extent his testimony was based on "scientific, technical, or other specialized knowledge," the bases for his opinions and questions concerning its admissibility would be governed by Rule 702. *See id.*

There was no question that the officer qualified as an expert with respect to those of his opinions governed by Rule 702, but his testimony did not differentiate between opinions derived from his perception and opinions based on technical or specialized knowledge. Courts have recognized an array of evidentiary problems that can arise when a single witness presents opinion testimony under Rule 701 and Rule 702 in an undifferentiated manner, such as:

(1) the witness's aura of credibility as an expert may inflate the credibility of her perception as a fact witness in the eyes of the jury;

(2) opposing counsel is limited in cross-examining the witness due to the risk that an unsuccessful attempt to impeach her expertise will collaterally bolster the credibility of her fact testimony;

(3) the witness may stray between roles, moving from the application of reliable methodologies into sweeping conclusions, thus violating the strictures of *Daubert* and Federal Rule of Evidence 702;

(4) jurors may find it difficult to segregate these roles when weighing testimony and assessing the witness's credibility; and

(5) because experts may rely on and disclose hearsay for the purpose of explaining the basis of an expert opinion, there is a risk the witness may relay hearsay when switching to fact testimony.

Id. at *2–3 (quoting *United States v. Moralez*, 808 F.3d 362, 365 (8th Cir. 2015) (further citation omitted)).

In *Overton* the undifferentiated testimony involved the officer's interpretations of coded drug terminology and slang, and also his interpretations of communications in uncoded English. *Id.* at *4. Defense counsel moved in limine to bar certain portions of the officer's anticipated dual-role testimony as improper expert opinion. The district court overruled that motion, in part because the defendant did not challenge the officers' Rule 702 qualifications, and also because the court "anticipated that the government would 'present the testimony in terms of the lay witness testimony and the expert testimony in a concise and differentiated way so that there's no confusion on the basis for the witness' testimony.'" *Id.* at *4.

The appellate court affirmed the district court's ruling on the motion in limine noting, however, that "the testimony at trial was not presented in a concise and differentiated fashion[]":

> To the extent [the officer's] opinions were based on his personal perceptions as an investigator on the case, rather than on his expert training and experience, this was never communicated to the jury, and [the officer] did not testify about any personal perceptions on which his testimony was based. As a result, there was no way for the jury or counsel—or now, us—to know whether the portions of [the officer's] testimony that went beyond the specific code words at issue were based on personal perceptions

> or whether they were impermissibly based on hearsay statements.

Id. at *4.

Because "portions of [the officer's] testimony constituted admissible expert testimony, [and] other portions did not[,]" *id.,* the appellate court then assessed the effect that the improperly admitted expert testimony had on the proceeding. On that point, the court concluded that the improperly admitted evidence was cumulative with other evidence properly admitted at trial and therefore harmless. *Id.* at *5. Thus, the mishandling of the dual-role testimony ultimately did not lead to the reversal in *Overton*.

Overton provides lessons for all involved in litigation involving dual-role expert testimony, beginning with its instruction to district courts to "take appropriate measures to minimize the problems that may arise from dual-role testimony." *Id.* That instruction, however, applies with equal force to the litigants in such cases.

For instance, in the absence of safeguards like those discussed in *Overton*, those opposing the dual-role testimony should be particularly vigilant to preserve objections to challengeable expert testimony which, at the time it is offered, might be mixed in among otherwise proper Rule 701 opinion. They also should be prepared to preserve objections to improper hearsay and other non-expert testimony that might appear to be offered as the basis for Rule 702 testimony.

Similarly, the proponents of the dual-role testimony also should take steps to ensure that the testimony in question is both admissible opinion and presented in a manner to avoid the prejudice and other concerns noted by the appellate court in *Overton*. Otherwise, their method of presenting their dual-role testimony could foster a procedural problem that later might undermine a successful outcome in the trial court.

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Guest Column

Another Victory for Reliable Science

By Robert E. Johnston and Gregory S. Chernack


Here at Hollingsworth, LLP, we love the state of Maryland. We love watching the Orioles (okay, most of us prefer the World Champion Nationals), boating on Chesapeake Bay, hiking along the Potomac, and well, living here! So we were thrilled to open our inboxes on August 28, 2020, to find out that Maryland finally adopted *Daubert*. With the Maryland Court of Appeals' opinion in *Rochkind v. Stevenson*, No. 47, Sept. Term, 2019, 2020 WL 5085877 (Md. Aug. 28, 2020), Maryland joins 40 states[1] in adopting the principles governing the admissibility of expert testimony first espoused in *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993). This decision finally leaves behind 6 states which still follow, at least to some extent, *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and three that follow neither *Frye* nor *Daubert*.[2] This is a solid win for reliable science in the courtroom as *Frye* was far too permissive in admitting junk science (although some plaintiffs' lawyers prefer to argue otherwise).

Background on Maryland's Admissibility Standard

Prior to this landmark opinion, Maryland courts admitted expert testimony through two different avenues: (1) Md. Rule 5-702; and (2) the *Frye–Reed* test. Md. Rule 5-702 governs the admissibility of all expert testimony. The rule provides that in order for expert testimony to be admissible, such testimony must assist the trier of fact to understand the evidence or to determine a fact in issue. To this end, Rule 5-702 requires that a trial court evaluate: (1) whether the witness is qualified as an expert by knowledge, skill, experience, training, or education; (2) the appropriateness of the expert testimony on the particular subject; and (3) whether a sufficient factual basis exists to support the expert testimony. Md. Rule 5-702. The third prong of this analysis—sufficient factual basis— includes two sub-elements: an adequate supply of data and a reliable methodology *Rochkind*, 2020 WL 5085877 at *9. Absent either element, the expert's opinions constitute nothing more than mere speculation or conjecture and are thus inadmissible. *Id.* Although the language does not precisely match Rule 702 of the Federal Rules of Evidence ("FRE"), the Maryland standard closely tracks the federal one. Nonetheless, in promulgating the rule, the Committee noted that Rule 5-702 was not meant to abrogate *Frye–Reed*, and that case law would develop and explain the standard for the admission of novel scientific techniques or principles. *See* Md. Rule 5-702 (Committee Note stating that "[t]his Rule is not intended to overrule *Reed v. State*, 283 Md. 374 (1978) and other cases adopting the principles enunciated in *Frye*.... The required scientific foundation for the admission of novel scientific techniques or principles is left to development through case law.")

The *Frye–Reed* test, on the other hand, dates back to 1978. *See Reed v. State*, 383 Md. 373 (1978). In *Reed*, the court of appeals adopted *Frye* in cases addressing the admissibility of expert witness testimony rooted in novel scientific principles or discoveries. Under the *Frye–Reed* test, "before a scientific opinion will be received as evidence at trial, the basis of that opinion must be shown to be generally accepted as reliable within the expert's relevant scientific community." *Id.* at 381. Put another way, "there must be some assurance that the novel method has gained general acceptance within the relevant scientific community and is not just the view of a dissident minority." *Dixon v. Ford Motor Co.*, 433 Md. 137, 150 (2013). The "relevant scientific community" includes the "full community of scientists with sufficient training and expertise to permit them to comprehend novel scientific methods, and

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[1] As of the date of this article, *Daubert* has been adopted in the District of Columbia and the following states: Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Missouri, Mississippi, Montana, North Carolina, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, West Virginia, Wisconsin, and Wyoming.

[2] States that have maintained *Frye* or some form of *Frye* as of the date of this article are: California, Illinois, Minnesota, New York, Pennsylvania, and Washington. Although California has declined to adopt *Daubert,* it finds the factors it laid out for the admissibility of expert testimony persuasive. *See Sargon Enterprises, Inc. v. University of Southern California*, 55 Cal. 4th 747 (2012) (recognizing the role of judges as gatekeepers and their ability to step outside the *Frye* standard). States that have not adopted *Daubert* or *Frye* are Nevada, North Dakota, and Virginia.

may not properly be restricted to those who practice or otherwise adhere to the methods at issue." *Reed v. State* at 444. Maryland courts never defined what would constitute a novel principle or scientific method. *Rochkind*, 2020 WL 5085877 at *9.

In theory, the relationship between the two tests was simple. Evidence rooted in novel principles had to satisfy both Md. Rule 5-702 and *Frye–Reed*. Evidence rooted in established principles had to withstand scrutiny under Md. Rule 5-702 only. The United States Supreme Court's 1993 decision in *Daubert* upset this simple dichotomy. In *Daubert*, the Court held that FRE 702 superseded *Frye* and made reliability the touchstone of the admissibility analysis (as opposed to general acceptance). The decision listed a number of flexible factors that could be persuasive in making the reliability determination. Most importantly, *Daubert* placed judges in a gatekeeping role, responsible for assessing the reliability of expert opinions, and not merely deferring to the relevant expert community. Since then, most states followed suit and rejected *Frye* in favor of the *Daubert* multi-factor approach. Until last month, Maryland remained in the minority of states that adhered to *Frye* (at least in part) although Maryland courts had started looking towards federal *Daubert* decisions in resolving expert witness evidentiary issues. *See e.g.*, *Rochkind*, 2020 WL 5085877 at *7–8 (citing *Blackwell v. Wyeth*, 408 Md. 575 (2009); *Chesson v. Montgomery Mut. Ins. Co.*, 434 Md. 346 (2013)).

In light of the developing *Daubert* case law in Maryland, the relationship between the tests became anything but simple. Courts struggled with which test to apply when the underlying data and its methods of collection were "generally accepted" in the community, but the conclusions were novel (or vice versa). *Id.* at *5 (citing *Blackwell*, 408 Md. at 596) (relying upon *Daubert* and its progeny and holding that medical expert opinion was not generally accepted in scientific community notwithstanding a basis in generally accepted methods). The *Rochkind* court sought to untangle this confusing relationship between Md. Rule 5-702, *Frye–Reed*, and *Daubert*.

Maryland's New Admissibility Standard

After reviewing the history of admissibility of expert testimony in Maryland, the court rejected the duplicative analytical process, eliminated the *Frye–Reed* test, and adopted *Daubert* as the "single standard by which courts evaluate all expert testimony." *Rochkind*, 2020 WL 5085877 at *11. The court enumerated 10 non-exclusive factors that are germane to interpreting Md. Rule 5-702:

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 scientific 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) Whether experts are proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinion expressly 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 he or she would be in his or her regular professional work outside his or her paid litigation consulting;
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.

See Rochkind, 2020 WL 5085877 at *16–17. The court specifically noted that *Daubert* was a flexible approach, and no single factor was dispositive: Courts may apply "some, all or none of the factors depending on the particular expert testimony at issue." *Rochkind*, 2020 WL 508577 at *17.

Why Now?

The court listed several reasons for why the time to adopt *Daubert* was now. It noted that Maryland's jurisprudence already "drifted" to *Daubert* by both explicitly and implicitly relying on and adopting principles from *Daubert* and its progeny. The *Daubert* principle most at play in Maryland courts is the "analytical gap" concept first enunciated in *General Electric Co. v. Joiner*, 522 U.S. 136 (1997). Per this concept, Maryland judges look for a causal link, or the absence of an "analytical gap," between the conclusion proffered and the data. In addition, the *Rochkind* court noted that just like in *Daubert* and its progeny, Maryland courts have implicitly recognized the trial judges'

gatekeeping function by requiring judges to consider the reliability of *all* evidence—both new and old.

Further, the court wanted to streamline the process and to stop "perpetuating a process wherein expert testimony must pass through *Frye–Reed* and Rule 5-702." *Rochkind*, 2020 WL 5085877 at *11. The court noted that this "duplicative analytical process" had "'muddied' the water of our approach to expert testimony." *Id.*

Most importantly, the court reasoned that *Daubert* is the better standard as it "centers on the reliability of the methodology used to reach a particular result," as opposed to acceptance of that methodology. *Rochkind*, 2020 WL 5085877 at *14. As the Maryland Court of Appeals pointed out, using general acceptance as the only measure of reliability "presents a conundrum." *Id.* This is because "a generally accepted methodology may produce 'bad science' and be admitted, while a methodology not yet accepted may be excluded, even if it produces 'good science.'" *Id.* The focus on reliability "will lead to better decision-making by juries and trial judges alike." *Id.* (internal citations omitted).

This Is a Win for Reliable Science

This is a win for reliable science. *Daubert* places clear constraints on trial judges to take charge of the quality of evidence, making them the gatekeepers who determine whether the evidence presented is reliable and hence admissible. They must carefully scrutinize an expert's opinion and cannot simply defer to the expert. This scrutiny applies to *all* expert testimony. Those sloppy methodologies, principles, and conclusions that have been able to pass by on "general acceptance" alone will meet new scrutiny in Maryland. To be sure, even under *Daubert* many judges abdicate this responsibility as they are unwilling or unable to understand the often-complex science at issue. *Daubert* at least tells them that they *should* be doing this, and at least some judges comply. Further, the failure to apply *Daubert* properly can present a strong argument on appeal.

Given this win, we checked on other states that have clung on to *Frye*. Maryland is the only one in the past few years that has made the transition to *Daubert* from *Frye*.[3] We are thrilled that Maryland decided to turn the tide, and join the supermajority of states that have adopted *Daubert.*

Practical Implications

There are three practical implications for Maryland litigators. First, expert testimony based on novel scientific principles will no longer need to jump through multiple hoops to be admissible. Now, litigants on both sides of the aisle must be prepared to argue *Daubert* factors in order to successfully admit or keep out testimony.

Second, the court provided a standard of review for both appellate courts and litigants. All decisions regarding expert testimony are now reviewable under the abuse of discretion standard. *Rochkind*, 2020 WL 5085877 at *17. Even though this is, in theory, a lenient standard, courts elsewhere have frequently found the failure to properly scrutinize expert testimony under *Daubert* is an abuse of discretion.

Finally, Maryland practitioners should keep an eye out for changes to Md. Rule 5-702. Since the court ruled that *Daubert* is the appropriate interpretation of Md. Rule 5-702, we expect the text of the rule to reflect the change. *See e.g. Rochkind*, 2020 WL 5085877 at *13 (When there is a change in common law, "the Maryland Rules undergo revision to reflect such a change.")

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[3] In 2018, New Jersey accepted *Daubert*, but it was not a *Frye* state previously.

Third Circuit Report

"Every Breath You Take": Policing Expert Testimony in an Asbestos Exposure Case

By Mark Jicka and Caroline Ivanov


In this issue, we review a district court's examination of medical expert opinions in a mesothelioma case, which highlights the importance of expert opinions fitting the controlling law. *Gorton v. Air & Liquid Sys. Corp.*, No. CV 1:17-1110, 2020 WL 4193649, at *1 (M.D. Pa. July 21, 2020). In *Gorton*, the plaintiff brought suit based on her deceased husband's alleged occupational exposure to products containing asbestos. *Id.* The defendants moved to exclude the expert opinions of two medical doctors, attacking the reliability and fit of their opinions. *Id.* Specifically, the defendants argued the experts relied on the theory that "each and every breath of asbestos is substantially causative of mesothelioma," a theory which the Pennsylvania Supreme Court has held is insufficient to create a jury question on causation. *Id.*

After a two-day hearing, the district court concluded there was a nuanced distinction between the defendants' framing of the experts' opinions and the experts' opinions. In examining the opinions' reliability under Federal Rule of Evidence 702, the court concluded that the experts did not base their opinions on the "each and every breath" theory but on a "cumulative theory of exposure." *Id.* at *2. This cumulative theory, the court explained, relied on the "irrefutable scientific fact that every exposure cumulatively contributes to the total dose (which in turn increases the likelihood of disease)." *Id.* (citing *Rost v. Ford Motor Co.*, 637 Pa. 625, 648, 151 A.3d 1032, 1045 (2016)). In rejecting the defendants' argument as to reliability, the court stated that while the Third Circuit has enumerated factors to examine whether an opinion is reliable, each of the factors is not applicable in every case. *Id.* The court emphasized that the reliability standard is not a requirement that the theory be "correct," and competing expert testimony will allow jurors to weigh the inadequacies of an expert's theories. *Id.*

The court next turned to the defendant's argument that the experts' theories did not fit the facts of the case. Rule 702 requires that expert testimony "help the trier of fact to understand the evidence or to determine a fact in issue." *Id.* This requirement is fulfilled when there is a connection between the expert's scientific research and theories and the particular disputed facts in the case. *Id.* The defendants in this case argued that the experts' testimony was inconsistent with Pennsylvania law on asbestos exposure and causation. *Id.* The court disagreed, pointing out that the experts reviewed the decedent's testimony about his exposure to products in issue and reviewed an exposure summary prepared by plaintiffs. *Id.* Likely because of this tenuous connection between the experts' theories and the available evidence of the decedent's exposure, the court reminded us that the factual dispute about the degree of exposure is for the jury. The court also emphasized that the defendants will be able to cross-examine the experts and contest their opinions at trial. *Id.*

Despite what appears to have been limited evidence of the decedent's asbestos exposure, the court denied the motion to exclude the experts' opinions. Interestingly, the court noted its ruling was without prejudice for the defendants to assert in a summary judgment motion that there is insufficient evidence to raise a genuine dispute of material fact as to the decedent's exposure to the defendants' product. *Id.* The court's reasoning and without prejudice ruling demonstrate that the court is loath to exclude expert testimony if there is a colorable argument that the testimony fits the facts of the case and controlling law.

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Fourth Circuit Report

Inverse *Daubert?*: The Danger of Expert-Based Attacks on Opposing Experts

By Derek M. Stikeleather and Matthew H. Tranter


A recent toxic tort action in a North Carolina federal court reminds practitioners that a defendant's attempt to undercut an opposing expert's conclusions can inadvertently weaken its own. *Rhyne v. United States Steel Corp.*, No. 3:18-cv-00197-RJC-DSC, 2020 U.S. Dist. LEXIS 131463, at *1 (W.D.N.C. July 23, 2020).

The *Rhyne* plaintiffs alleged that Mr. Rhyne's exposure to various benzene-containing products that the defendants manufactured had caused his acute myeloid leukemia ("AML"). After nine defendants were dismissed, the remaining three moved to exclude the testimony of plaintiffs' causation and exposure experts, and the plaintiffs moved to exclude a defense expert's testimony.

One of the three remaining defendants, Safety Kleen, argued (among other things) that the plaintiffs' general-causation experts had addressed the relationship between AML and benzene, but not the relationship between AML and Safety Kleen's benzene-containing product. Safety Kleen claimed that—without expert testimony to connect cancer to its product—the opinions of plaintiffs' causation experts were unreliable and irrelevant.

Safety Kleen supported its expert challenge with a declaration from its own toxicologist, David Pyatt, and two benzene AML toxic tort cases, *Henricksen v. Conoco Phillips Co.*, 605 F. Supp. 2d 1142 (E.D. Wash. 2009) and *Burst v. Shell Oil Co.*, No. 14-109, 2015 U.S. Dist. LEXIS 77751 (E.D. La. June 16, 2015).

In both cases, the parties agreed that gasoline contained benzene and benzene was related to AML. But the defendants argued that large-scale studies of gas-truck drivers and gas-station attendants (the respective jobs of the *Henricksen* and *Burst* plaintiffs) had not connected AML to gasoline exposure. After studying the scientific literature that the plaintiff's experts relied on, the *Henricksen* court found that the data contradicted the expert's conclusion that gasoline exposure causes AML and struck the plaintiff's general causation experts. Similarly, after examining the literature that the plaintiff's expert relied on, the *Burst* court struck the expert for improperly relying on three types of studies: studies that (1) failed to isolate exposure to gasoline; (2) "did not exhibit statistically significant results or did not indicate a positive association between gasoline exposure and AML"; and (3) "did not specifically examine AML[.]" *Burst*, 2015 U.S. Dist. LEXIS 77751 at *18–19. The same expert had also "cherry-picked data from studies that did not otherwise support his conclusion, failed to explain contrary results, reached conclusions that the authors of the study did not make, and manipulated data without providing any evidence of his work." *Id.*

In *Rhyne*, the declaration by Safety Kleen's toxicologist (Pyatt) relied on eighteen studies. It stated that "there have been over a dozen studies where investigators have specifically evaluated" Safety Kleen's benzene-containing-product "related to AML or leukemia risk." Pyatt claimed that the "studies are uniformly negative regarding increased risk of leukemia, AML or related diseases." *Rhyne*, 2020 U.S. Dist. LEXIS 131463 at *19.

But the *Rhyne* court faulted Pyatt for the same error made by the plaintiffs' experts in *Henricksen* and *Burst*: relying on inconsistent scientific literature for his conclusions. The court "extensively reviewed" seventeen of the studies that Pyatt cited and found that "they are not uniformly negative regarding exposure" to Safety Kleen's benzene-containing-product "and an increased risk of AML." *Id.* Liberally quoting and citing from several of the studies, the court found them irrelevant to the state of the literature as they did not address the exposure to the defendant's product, or the risk of AML. *Id.*

Put differently, the *Rhyne* court turned Safety Kleen's attack on the plaintiffs' experts against the defense expert that submitted the supporting declaration. And while the plaintiffs had not moved to exclude Pyatt, the court's critique of his declaration gives them good ammunition to challenge his opinions going forward.

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Sixth Circuit Report

Sixth Circuit Rejects "Multiple Chemical Sensitivity" Opinions as Unreliable

By Diana M. Comes

In *Madej v. Maiden*, 951 F.3d 364 (6th Cir. 2020), Cynthia Madej claimed to suffer from "multiple chemical sensitivity," which she said caused her to suffer from burning eyes and throat, chest tightness, shortness of breath, chronic headaches, dizziness, and nausea, when exposed to chemicals in everyday materials. The World Health Organization and the American Medical Association do not recognize multiple chemical sensitivity as a disease, but Ms. Madej claimed that she had reacted to countless substances ranging from cleaning products to pesticides to wood. As a result, she and her husband, Robert, moved to a rural home in Athens County, Ohio, where Ms. Madej slept in a structure lined with glass, to avoid the wood in her house. She rarely left home.

After the Madejs moved to Athens County, they presented to the county engineer a letter from Allan Lieberman, an environmental-medicine specialist, requesting advance notice of planned chemical spraying near their home. When Jeff Maiden became the county engineer, his office paved a nearby road, and Ms. Madej reportedly reacted to the work. The Madejs reminded the county engineer's office about her sensitivities, but were assured that no work was planned for the road they lived on—until 2015. At that time, after receiving complaints about the poor condition of the road, Maiden's office decided to "chip seal" the road, and gave the Madejs one day's notice of the work. The Madejs objected and eventually filed suit against Maiden in his official capacity, asserting claims under both the Fair Housing Act and Americans with Disabilities Act.

Maiden moved to exclude the opinions of Ms. Madej's two treating physicians and an expert witness. The district court found that these doctors' opinions were unreliable under Fed. Rule Civ. P. 702 and excluded their opinions. Interestingly, although the case alleged FHA and ADA violations, the district court invoked the causation rules from toxic-tort cases, reasoning that the Madejs were required to show both general causation (that the asphalt in chip seal *can* cause multiple chemical sensitivity) and specific causation (that this asphalt *would* cause Ms. Madej such injury). The district court noted that the FHA required a reasonable accommodation for a person with a handicap when that accommodation is necessary to give the person an equal opportunity to enjoy a dwelling, and found that this "necessary" element contained a causation test.

On appeal, the Sixth Circuit affirmed. To begin, the Sixth Circuit noted that this was *not* a toxic-tort case; rather, it involved housing and disability claims. The Madejs argued that the district court focused on irrelevant causation standards from state tort law. But the Sixth Circuit said, even if that were correct, the federal statutes on which they relied required them to show that the use of chip seal on the road would cause Ms. Madej harm, and so the district court was right to ask whether the doctors' opinions were reliable enough to address this causation question for the federal claims. (The Madejs' counsel also conceded at oral argument that they did not challenge the district court's ruling that they needed expert testimony on causation to survive summary judgment.)

The Sixth Circuit first looked to precedent and noted that many courts have held as inadmissible expert testimony that relies on "multiple chemical sensitivity" as a controversial diagnosis unsupported by sound scientific reasoning or methodology. And the Madejs' own doctors acknowledged that the diagnosis was not recognized by the American Medical Association and not listed in the World Health Organization's International Classification of Diseases.

One of the Madejs' experts, Dr. John Molot, acknowledged that there was no way to test which chemicals would cause harmful reactions to Ms. Madej, did not conduct any objective tests, and did not observe her display any sensitivity to asphalt. He based his opinions solely on what she told him. This provided the district court a proper ground to find that he did not reliably rule out non-asphalt causes for her sensitivities. Next, Dr. Allan Lieberman, Ms. Madej's treating physician, also relied primarily on Ms. Madej's self-reporting to form his opinion about her sensitivities, and his opinions were unreliable for the same reasons as Dr. Molot's. Finally, Ms. Madej's primary-care physician Dr. Barbara Singer was not qualified to provide a causation opinion because she conceded that it was not her "skill set" to diagnose multiple chemical sensitivity and she did not know the criteria for diagnosing it. She did not even know where she would begin in order to test Ms. Madej for sensitivity to asphalt. Her opinion that asphalt would harm Ms. Madej was purportedly based on Dr. Lieberman's diagnosis of multiple chemical sensitivity. The court was not impressed by that reliance, because Dr. Lieberman did not actually make such a diagnosis, since the condition is not a recognized disease.

Overall, the Sixth Circuit held that the district court did not abuse its discretion in excluding the opinions of any of these experts and, because the Madejs did not challenge the need for expert causation testimony, the absence of that evidence compelled affirmance of summary judgment for Maiden. Although this case is about the FHA and ADA and not about toxic torts, the *Daubert* analysis is likely to prove useful in such a case where the plaintiff alleges multiple chemical sensitivity.

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In Examining Reliability of Methodology, Courts Separate Science from Say-So

By Elaine M. Stoll

In two recent decisions, district courts within the Seventh Circuit examined the science purportedly underpinning proposed expert opinions and excluded as unreliable opinions that distorted, failed to reliably apply, or contradicted the pertinent principles.

In a case involving allegations by the purchasers of a recreational vehicle that it exceeded weight standards and lacked the warranted cargo carrying capacity, the U.S. District Court for the Northern District of Indiana excluded an engineer's proposed testimony about effects of weight redistribution within the RV because he did not reliably apply physics and engineering principles and failed to validate his theory. *Smith v. Nexus RVs, LLC*, No. 3:17-cv-815-DRL-MGG, 2020 WL 3958685 (N.D. Ind. July 13, 2020). In an action under 42 U.SC. §1983 brought by an exoneree who served years in prison, the U.S. District Court for the Northern District of Illinois excluded proposed testimony by a DNA expert that a particular kind of DNA profile should not be interpreted, finding his opinion not just unsupported but contradicted in his field of forensic DNA testing. *Andersen v. City of Chicago*, No. 1:16-cv-01963, 2020 WL 3250680 (N.D. Ill. June 16, 2020).

Both courts identified and explained methodological missteps in reference to the applicable science.

The plaintiffs in *Smith* alleged that the RV they purchased exceeded weight standards and lacked the cargo carrying capacity warranted by the seller. *Smith*, 2020 WL 3958685, at *1, 4. In defense of breach-of-warranty and deceptive-sales-practices claims, the seller retained a former employee, an engineer, to opine on the vehicle's weight and carrying capacity. *Id.* at *1. The expert developed a theory that "cantilever action" would occur when adding weight to the rear of the coach. *Id.* at *2. He opined that adding weight to the rear axle "will pull weight from the front axle providing more available weight to be placed on the front axle," and that "depending on the actual load, every pound placed in the rear portion of the vehicle will increase the available weight on the front axle." *Id.* The plaintiffs moved to exclude the "cantilever" testimony as unreliable. *Id.*

The Northern District of Indiana granted the motion, excluding the expert's "cantilever" opinion as unreliable and unhelpful. *Smith*, 2020 WL 3958685, at *4. The court began by recognizing that "cantilever" is a scientific or technical term referring to a beam fixed at one end and hanging free on the other. *Id.* (quoting *McGraw–Hill Dictionary of Scientific and Technical Terms* (3d ed. 1984)). While the term "cantilever effect" is at times "loosely translated" to describe how placing weight on one end of a beam resting on a fulcrum has the effect of causing the beam "to shift on the other side, like two kids of unequal weight playing on a see-saw," the expert had attempted to extrapolate cantilevering to the context of a two-axle vehicle to explain the distribution of weight within. *Id.*

The first reliability problem was that weight distribution in a two-axle vehicle depends not just on weight, but on the weight's placement, its proximity to the axles, the vehicle's overall wheelbase, and the fulcrum forces placed on each axle as a matter of that weight distribution. *Smith*, 2020 WL 3958685, at *4. The expert ignored those critical variables. *Id.* "As a matter of physics and engineering," his suggestion that placing weight on the rear axle would in lockstep fashion alleviate that amount of weight from the front axle's total load was inaccurate, and his "crude perspective" "fundamentally distort[ed] the actual analysis." *Id.* at *5. Moreover, the expert was unfamiliar with any method for calculating the change in weight distribution and its effect on gross vehicle weight rating and gross axle weight rating and unfamiliar with the formula he conceded applied to RV loading and weight distribution. *Id.* at *4–5. In his work designing vehicles, he had physically redistributed weight to see what effect it may have on a vehicle, because the effect would be vehicle-specific, but he never performed that work on the plaintiff's RV or one like it. *Id.* at *5. Consequently, the expert lacked a sound factual basis for his opinion. *Id.* at *4–5. The court quoted former Supreme Court justice Benjamin Cardozo for the principle that "opinion has a significance proportioned to the sources that sustain it" and found that the expert's opinion "lack[ed] any such source." *Id.* at *5 (quoting *Petrogradsky Mejdunarodny Kommerchesky Bank v. Nat'l City Bank of New York*, 170 N.E. 479, 483 (N.Y. 1930)).

The second reliability problem was that "his method isn't really a method at all; it is his say-so divorced from any factual basis or any validation that mirrors the method one, experienced as he may be in the field, would employ…." *Smith*, 2020 WL 3958685, at *5. The expert's admission that he would need to physically redistribute weight in the plaintiff's RV to determine its effects and his failure to do so—abandoning the method he used in the past for non-litigation work—left him "[t]alking off the cuff—deploying neither data nor analysis." *Id.* (quoting *Lang v. Kohl's Food Stores, Inc.*, 217 F.3d 919, 924 (7th Cir. 2000)).

The third reliability problem was that the expert's failure to properly validate his opinions, such as through available testing, "leaves the error rate to his theory unreliably high and fundamentally speculative." *Smith*, 2020 WL 3958685, at *5 (citing *Winters v. Fru-Con Inc.*, 498 F.3d 734, 743 (7th Cir. 2007)).

Unhelpfulness to the jury was a fourth bar to the admissibility of the expert's so-called cantilever theory. *Smith*, 2020 WL 3958685, at *6. The court found that the "theory does not reliably guide the jury to answer the question it must: whether the RV was fit for its ordinary purposes." *Id.* The court compared the expert to a witness who might appreciate the scientific principles of gravity but who "could not say that it causes an object to fall at the rate of 9.8 meters/second2 (without regard to mass) or use that to calculate the impact force of a falling object" on person struck and injured, and likewise compared him to someone who might "appreciate that friction exists as a scientific principle" but "cannot put into words how that is measured in terms of its static or dynamic coefficient to explain its effect on the rubber soles of work boots." *Id.* Such a limited understanding does not pass Rule 702 muster: "[I]t's one thing to appreciate that a principle exists; it's quite another to do one's homework and apply the principle reliably in a case to enable an opinion in federal court and to guide a jury to answer the question in dispute." *Id.*

Fifth, the court found that the expert's years of experience in the RV industry did not enable him to opine about his cantilevering theory. *Smith*, 2020 WL 3958685, at *6. "[E]ven if eminently qualified, experts cannot offer opinions based merely on their say-so." *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 157 (1999); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997); *Zenith Elecs. Corp. v. WH-TV Broad. Corp.*, 395 F.3d 416, 419 (7th Cir. 2005)). "The jury would be left assuming a general principle—the cantilever theory—but only because [the expert] says it operates here, without data or other validation that would permit the jury to utilize it to reach a verdict. That is exactly the proposed testimony that the *Daubert* trilogy and Rule 702 properly exclude." *Id.* (citing *Echo, Inc. v. Timberland Machs. & Irrigation, Inc.*, 661 F.3d 959, 965 (7th Cir. 2011)). The court excluded the expert's proposed testimony on his cantilever theory but permitted independent and unchallenged opinions on cargo carrying capacity and certified scale weight.

In *Andersen*, the plaintiff was exonerated after serving 25 years in prison on a conviction for murder and attempted rape. *Andersen*, 2020 WL 3958685, at *1. He sued the City of Chicago and members of law enforcement involved in his criminal case, alleging in a §1983 action that the defendants violated his constitutional rights and asserting several state-law claims. *Id.* He moved to exclude the testimony of a defense DNA expert retained to review and interpret DNA testing results from DNA samples from the decedent's fingernails and a knife recovered from the crime scene. *Id.* at *1–2. His own experts concluded that the test results excluded the plaintiff and/or the decedent as contributors of DNA to certain samples. *Id.* at *2.

The expert planned to rebut those conclusions by testifying that the DNA profiling test results associated with the knife samples and minor contributor to the fingernail samples "should all be considered 'inconclusive.'" *Andersen*, 2020 WL 3958685, at *2. He stated that "there is no generally accepted means of attaching a reliable statistical weight to a mixed DNA sample with an unknown number of contributors where allelic drop-off may have occurred," and opined that a partial profile "should not be used to exclude or include anyone as a contributor." *Id.* Because the samples taken from the crime scene evidence resulted in partial profiles, the expert said they should be deemed "inconclusive." *Id.* The plaintiff did not challenge the defense expert's qualifications but moved to bar his opinions on grounds they were not based on scientific methodology and would mislead jurors. *Id.*

The Northern District of Illinois granted the motion and excluded the expert's testimony in its entirety. The admissibility problem, the court explained, was that the expert's opinion "is in stark contrast to what is being done in the field of forensic DNA testing." *Andersen*, 2020 WL 3958685, at *3. Accredited labs "interpret partial profiles and draw conclusions from them." *Id.* The expert was not aware of any lab that subscribed to his blanket approach to decline to interpret a partial profile. *Id.* Nor did any source to which the expert or the defendants pointed on the uncertainty in interpreting partial profiles to *include* a potential suspect reach the conclusion the expert espoused

that the data should not be interpreted at all and could not be used to *exclude* a suspect. *Id.*

The court concluded that the expert's "blanket methodology is unsupported by his cited sources and is not generally accepted within his field." *Andersen*, 2020 WL 3958685, at *4. Because the expert's method was unreliable, his opinion that the partial profiles derived in the case should be deemed inconclusive as to the plaintiff and decedent was inadmissible. *Id.*

Both recent decisions spotlight the effective use of science as ammunition in excluding unreliable expert opinions. The movants' efforts to explain the underlying principles and to contrast the experts' unreliable extrapolations and distortions with credible scientific sources succeeded in convincing the courts that the proposed testimony lacked scientific support.

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Eighth Circuit Report

A Reminder from the Eighth Circuit to Be Cautious When Providing Confidential Information to Experts

By Patrick J. Kenny

The United States District Court for the District of Minnesota considered an interesting *Daubert*-related issue in a recent ruling in *Hudock v. LG Elecs. U.S.A., Inc.*, No. 0:16-CV-1220-JRT-KMM, 2020 WL 2848180 (D. Minn. June 2, 2020). There the question was the standard under which federal courts should evaluate whether information submitted in connection with the filing of *Daubert* motions can be sealed.

The issue arose in connection with *Daubert* motions by the defendants to exclude "the evidence provided by Plaintiffs' damages experts… and if those motions are successful, they suggest the Plaintiffs' claims should be dismissed because they have no admissible damages evidence." *Id.* at *2. The parties filed various materials with redactions and under a temporary seal in connection with defendants' *Daubert* motions. They later agreed to submit many of those same materials unredacted and unsealed, but disagreed as to the continued sealed status of defendants' memorandum in support of their *Daubert* motions, the declarations of three experts, supporting documents used by those experts, plaintiffs' opposition memorandum, and defendants' reply memorandum.

As it turns out, there are different potentially applicable standards bearing on the question of whether materials may be kept under seal, turning upon whether the records at issue are considered "judicial records." *Id.* at *1. As to judicial records, there is a presumption in favor of public access, requiring parties seeking to have the information remain sealed "show that there is a 'compelling reason' to overcome the public's right to access judicial records." *Id.* Conversely, "[i]f the documents at issue are not 'judicial records,' then the Court applies a 'good cause' standard to determine whether the material should be sealed." *Id.* at *2.

Those competing standards led the court in *Hudock* to the question of whether materials submitted in connection with a *Daubert* motion should be considered "judicial records," and ultimately led it to the conclusion that the "compelling reason" standard should apply if the documents are "more than tangentially related to the merits of a case":

> The Court has not located any controlling precedent indicating whether documents filed in connection with *Daubert* motions are subject to the "compelling reason" standard for remaining sealed or the more lenient "good cause" standard. However, several courts apply the stricter

> standard when documents at issue are "more than tangentially related to the merits of a case...."

Id. at *2 (further citations omitted).

Though that "more than tangentially related to the merits" test might be the brightest line as will be found in this area, it clearly is not very bright, as the parties in *Hudock* demonstrated. The defendants understandably argued that the good cause standard should apply because their *Daubert* motions were directed, not at the merits, but simply at the admissibility of certain expert testimony bearing on damages. *Id.* Thus, they reasoned, the challenged materials were not more than tangentially related to the merits of the case. They also argued that their *Daubert* motions were not more than tangentially related to the merits because they would be entitled to summary judgment even if the challenged expert testimony was admitted based on the alleged insufficiency of the challenged testimony. *Id.*

The district court disagreed, concluding that the materials were more than tangentially related to the merits of the case based on the potential effect that granting the motions would have:

> the Defendants understate the degree to which their efforts to exclude the opinions and testimony of Plaintiffs' damages experts are intertwined with the issues raised in the summary-judgment motion.... More specifically, Defendants ask the District Court to exclude the evidence provided by Plaintiffs' damages experts in their *Daubert* motion, and if those motions are successful, they suggest the Plaintiffs' claims should be dismissed because they have no admissible damages evidence.

Id.

Apart from the question of whether the materials at issue in *Hudock*, in fact, should be unsealed, it would not seem that that the approach advocated by the defendants, or the approach ultimately adopted by the district court, were appropriate to evaluate the "relatedness" of material used to support a *Daubert* motion. *Daubert* motions are by nature motions concerning the admissibility of expert evidence. Thus, if the defendants' approach was valid, all *Daubert* motions and their related materials would be considered *not to be* "more than tangentially related to the merits" of the case. Yet, there certainly are some (if not many) cases in which material central to the merits of the case are used to support a *Daubert* motion.

Conversely, it would seem to be an exceptionally rare event that party would file a *Daubert* motion without an expectation that the motion would have a substantive effect on the proceedings. If the "relatedness" of the challenged material is governed by the potential impact that granting the *Daubert* motion would have on the proceeding, then all *Daubert* motions and their related materials would be considered *to be* "more than tangentially related to the merits" of the case. Yet, it is simple to envision materials with little relation to the merits of a lawsuit being submitted in connection with a challenge to the admissibility of an expert's testimony.

It is worth noting that the question of whether materials to be sealed are "more than tangentially related to the merits of a case" could be addressed item by item, rather than globally as appears to have been the method advocated by defendants and the different method utilized by the district court. Documents, such as those that apparently were at issue in *Hudock*, addressing sensitive issues of competition, indeed might be intertwined with the merits of the case, and thus would need to satisfy the "compelling reason" test to remain sealed. However, not all materials considered by experts are so directly tied to the merits of the dispute between the parties. For instance, it would not seem that the "compelling reason" test should be used to decide whether to redact third party information from testing or survey materials that might be used to support or challenge admission of an expert's testimony.

As there appears to be no definitive rule even as to the standard applicable to evaluate requests to retain filings under seal, practitioners would be well advised to be cautious what information they use in the development of and challenges to expert opinion.

As always, if you should have any thoughts or feedback on this column, please do not hesitate to contact me.

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Ninth Circuit Report

U.S. v. Valencia-Lopez Vacates Defendant's Conviction and Remands for New Trial After District Court Failed to Conduct Expert Reliability Finding

By Dana C. Kopij

In *United States v. Valencia-Lopez*, No. 18-10482, 2020 WL 4814139 (9th Cir. Aug. 19, 2020), the United States Court of Appeals for the Ninth Circuit found that the United States District Court for the District of Arizona abused its discretion after it failed to make any explicit reliability finding regarding an "experience-based" expert's testimony. The court of appeals explained that the non-scientific testimony was subject to the same "gatekeeping function" required under *Daubert*, either by hearing or voir dire.

Defendant Valencia-Lopez is a truck driver who transported 15,000 kilograms of bell peppers from Mexico to Arizona. During a customs inspection, officers found over 6,000 kilograms of marijuana hidden in the bell pepper packages. Valencia-Lopez was convicted of four drug felonies for the transportation and importation of marijuana. At trial, Valencia-Lopez claimed he acted under duress, and that armed gunmen kidnapped him at gunpoint for several hours; seized his truck; and told him to continue driving and pretend that nothing happened, or he and his family would be killed.

In order to convict Valencia-Lopez, the government produced an expert, U.S. Immigration and Customs Enforcement (ICE) Supervisory Special Agent Matthew Hall, to opine on the likelihood of drug trafficking organizations entrusting a large quantity of illegal drugs to the driver of a commercial vehicle who was forced or threatened to comply. Agent Hall testified that the likelihood of this happening was "[a]lmost nil, almost none."

Before trial, the government indicated that it intended to offer Agent Hall's testimony to demonstrate that "drug-trafficking organizations do not typically use unknowing couriers." Valencia-Lopez moved to preclude this testimony, and the government amended the proposed testimony to include a "risk-management analysis that the use of threatened couriers would place the narcotics at a higher risk for seizure than using non-threatened couriers."

Valencia-Lopez filed another motion to preclude the testimony and specifically requested a *Daubert* hearing. He argued that there was no methodology to substantiate Agent Hall's proposed testimony. The district court denied Valencia-Lopez's motion but stated that there "certainly… can be voir dire of the expert… to assure that he is qualified to testify as to these matters" at trial."

At trial, the government presented Agent Hall's testimony to the jury. He testified that, based on his experience of going undercover, he had insight into how drug trafficking organizations operated. He did not, however, have experience of going undercover in Mexico. After direct examination was complete, the government moved to qualify him as an expert. Valencia-Lopez objected and requested to voir dire Agent Hall. Valencia-Lopez argued that Agent Hall lacked any experience directly working with drug cartels in Mexico and that he had not adequately explained the basis for his specialized knowledge. The

court overruled the objection and ruled that the objection went "more to the weight of the evidence" as opposed to admissibility.

Valencia-Lopez again objected and requested a *Daubert* hearing through voir dire. The court overruled the objection, did not allow voir dire, and found a *Daubert* hearing was not required "particularly in light of the issues that were raised in the *Daubert* hearing about testing and such that don't apply to experts such as Agent Hall."

Here, the court of appeals found that the district court abused its discretion by failing to make any finding regarding the reliability of Agent Hall's testimony, instead allowing him to testify as to how drug trafficking organizations operate and dismissing Valencia-Lopez's argument as going to the weight, not admissibility. The appellate court noted that reliability becomes even more important with "experience-based" expert opinions rather than "science-based" because the opinion is not subject to same type of routine testing, error rate, or peer review types of analysis. The court found that Agent Hall's testimony should have been subject to the same "gatekeeping function" or admissibility function in a *Daubert* hearing or in voir dire.

The court found that the error was *not* harmless as the main issue at trial was whether Valencia-Lopez was under duress, and Agent Hall's testimony went directly towards this issue. The court vacated Valencia-Lopez's convictions and remanded the case for a new trial.

In summary, the court held that the government had not carried its burden that the error was harmless, and it was not permitted to speculate that the jury both disregarded Agent Hall's testimony and disbelieved Valencia-Lopez's testimony regarding his duress. In light of this decision, practitioners should be diligent in making the proper pre-trial and trial objections for reliability and admissibility, especially relating to "experience-based" experts.

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