THE DEFENSE LINE

A Publication From The Maryland Defense Counsel, Inc.

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Important Announcements

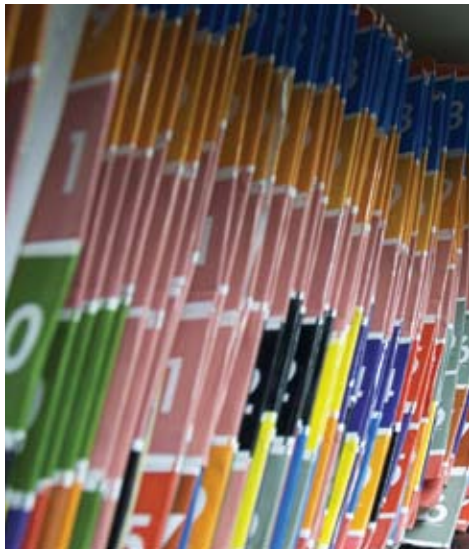
Mark your calendars now for the **Annual Crab Feast**
June 4, 2009
5:30 p.m.

Call 410.560.3895 or mddefensecounsel.org for details

Challenging Plaintiff's Causation Theory

By John T. Sly and April Hitzelberger

A major frustration in Maryland medical malpractice cases has been the ease with which plaintiffs have been able to admit questionable expert opinions, especially on the issue of causation. We have had recent success in challenging plaintiffs in this regard. This article is a brief synopsis of the applicable law in Maryland on the issue of the admissibility of expert testimony and, as importantly, the process by which it can be challenged.



I. The Law

Expert testimony is admissible in Maryland only if: (1) the witness is qualified as an expert by knowledge, skill, experience, training or education; (2) the expert testimony is appropriate on the particular subject; and (3) there is a sufficient factual basis to support the expert testimony. Md. Rule 5-702[1]; *Wood v. Toyota Motor Corp.*, 134 Md. App. 512, 519 (2000). "Furthermore, the testimony must also reflect the use of reliable principles and methodology in support of the expert's conclusions." *Giant Food, Inc. v. Booker*, 152 Md. App. 166, 183 (2003) (citing Wood, 134 Md. App. at 523). "[W]hile Rule 5-702 does not specifically state that the expert testimony must be the product of reliable principles and methods (*i.e.*, phraseology taken from Fed.R.Evid. 702), Maryland case law interpreting Rule 5-702 requires such a foundation." *Id.*

While Maryland has not formally adopted the federal *Daubert* analysis, Maryland appellate courts appear to be moving in the direction of applying what might be called a "*Frye*-plus" test. In other words, Maryland will require a sufficient basis, a reasonable methodology and a conclusion that logically flows from the basis and methodology (the Daubert test) but will also continue to require that the methodology and conclusion be generally accepted before being admissible (an element lacking in *Daubert* but present in *Frye*)[2].

The decision as to the admissibility of an expert's opinion is firmly within the discretionary purview of the trial court. "'It is within the sound discretion of the trial judge to determine the admissibility of expert testimony' and that 'the trial court's action in the area of admission of expert testimony seldom provides a basis for reversal.'" *Buxton v. Buxton*, 363 Md. 634, 651 (2001) (*citing In re Adoption/Guardianship, No. CCJI4746*, 360

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[1] *Rule 5-702 provides:*
Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that the testimony will assist the trier of fact to understand the evidence or to determine a fact in issue. In making that determination, the court shall determine (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. R. Civ. Pro. § 5-702 (2007).

[2] *The appropriate analysis in Maryland is evaluation of the putative expert's opinions pursuant to* Frye v. United States, *293 F. 1013 (D.C. Cir. 1923) and* Reed v. State, *283 Md. 374 (1978) which require that the opinions be generally accepted in the particular scientific/medical community before they are admissible.*

(CAUSATION THEORY) *Continued from cover*

Md. 634, 647 (2000)). "It is well settled that the trial judge — not the expert witness — determines whether there exists an adequate factual basis for the opinion at issue." *Wood*, 134 Md. App. at 523.

II. Procedure

In *Clemens v. State*, 392 Md. 339 (2006), the Court of Appeals said: "Judges have discretion to defer a pre-trial ruling on a motion in limine and ordinarily do so where the issue can be better developed or achieve a better context based on what occurs at trial. Where evidence is subject to challenge under *Frye-Reed*, however, the issue should, whenever possible, be dealt with prior to trial. *Id.* at 349 n. 6 (emphasis added). Furthermore "[d]ealing with the issue pretrial also avoids delays and diversions at trial that may inconvenience both witnesses and the jury." *See* Maryland Rule 5-104(c) ("Hearings on preliminary matters shall be conducted out of the hearing of the jury when required by rule or the interests of justice.") *Id.* The Court explained that:

> *Maryland Rule 5-103(c) also provides support for our conclusion that* Frye-Reed *examinations are better conducted in pre-trial hearings in its admonition that "[p]roceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to a jury by any means, such as making statements or offers of proof or asking questions within the hearing of the jury." Conducting the hearing outside the presence of the jury would preclude its members from improperly considering evidence that is irrelevant to the task at hand and ensure that the verdict is derived from evidence properly before it.*
>
> *If the issue is to be dealt with at trial, it should be addressed, in its entirety, as a preliminary matter prior to admission of the challenged evidence, not, as here, by having the challenge made only to [the expert's] status as an expert during the State's case and then receiving most of the evidence bearing on whether the inferences sought to be drawn…are generally accepted in the relevant scientific community during the defense case, after the challenged inferences have already been admitted.* Id.

Because of these considerations, the *Clemens* Court found that an evidentiary hearing should be held on any *Frye-Reed* challenge to an expert's testimony, "[i]f a party raises a *Frye-Reed* objection, all evidence bearing on admissibility of the challenged evidence should be presented and considered ***before*** a ruling is made on the challenge." *Id.* (emphasis in original).

The Court of Appeals recently reaffirmed and expounded upon its reasoning in *Montgomery Mutual Ins. Co. v. Chesson*, 399 Md. 314 (2007). Additionally, the *Chesson* Court clearly stated that medical doctors are subject to the *Frye-Reed* analysis—a question previously left open by *dicta* in other cases.

In *Chesson*, the Court held that a pretrial hearing is *required* in a case pursuant to *Frye-Reed* "when it is unclear whether the scientific community accepts the validity of a novel scientific theory or methodology" in order to demonstrate its reliability. *Id.* at 327. (emphasis added). In reaching its decision, the Court was particularly persuaded by the fact that appellee's expert offered no journal articles from reliable sources or other publications to shed light on the acceptance of his views and admitted that no other practitioners in the field shared his opinions. *Id.* at 327, 332-33, n.7. Without sufficient evidence of reliability, the expert's testimony must be excluded. *Id.*

III. *Booth v. University of Maryland Medical System (UMMS)*

In *Booth v. UMMS* (Baltimore City Circuit Court Case No. 24-C-06-5867) Plaintiff's anesthesia experts sought to link the attempt at regional anesthesia to profound neuropathy in an extremity. On behalf of UMMS, we argued there was no basis for Plaintiff's allegations and that her experts had failed to apply a reasonable methodology in developing their causation argument (analysis pursuant to Md. R. 5-702) and that their opinions were not supported by the medical literature (*Frye-Reed*). These issues were raised in multiple pretrial motions.

As a result of the pretrial motions challenging Plaintiff's experts' causation theories, and a formal request for a hearing on those motions, Plaintiff was forced to produce one

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Editor's Corner

The Editors are proud to publish this latest edition of *The Defense Line*, which features several interesting articles and case spotlights from our members. The lead article from John T. Sly, who is the co-chair of The Maryland Defense Counsel's Judicial Selections Committee, discusses Maryland's standard for the admissibility of expert testimony in medical malpractice cases. Kathleen Pontone, a partner at Miles & Stockbridge P.C. and the head of the firm's Labor & Employment Group, presents an article offering advice on how law firms should approach the evaluation of its lawyers in today's legal environment. In addition to these articles, Gregory M. Garrett, an associate in the Litigation Department at Tydings & Rosenberg LLP, highlights a recent Maryland Court of Appeals decision in which the court analyzed the learned intermediary doctrine under Maryland law.

The Maryland Defense counsel has had a number of successful events since the Summer 2008 edition of *The Defense Line*, including the always popular Past Presidents Reception. Mark your calendars now for Maryland Defense Counsel's Annual Meeting and Crab Feast, which will take place on June 4, 2009 at 5:30 at Bo Brooks in Canton! The Editors encourage our readers to visit the Maryland Defense Counsel website (www.mddefensecounsel.org/events) for full information on the organization's upcoming events.

The Editors sincerely hope that the members of the Maryland Defense Counsel enjoy this issue of *The Defense Line*. In that regard, if you have any comments or suggestions or would like to submit an article or case spotlight for a future edition of *The Defense Line*, please feel free to contact the members of the Editorial Staff.

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of her experts at a pretrial hearing. (Plaintiff declined to produce her second expert.) The pretrial hearing permitted extensive cross-examination in support of the *Frye-Reed*/Md. R. 5-702 motion and other motions filed on behalf of UMMS. The judge had the benefit of hearing the expert's testimony which lead, in part, to the court granting a related dispositive causation motion.

IV. Conclusion

The soft underbelly of most medical malpractice cases is causation. Plaintiff experts are adept at identifying alleged breaches in the standard of care and the alleged damages involved. What they often lack is a real scientific basis for their causation opinion. This is where the challenge to their admissibility must be focused. These are a few of the steps that can be employed in seeking to preclude unreliable expert testimony:

a. Question the expert closely at deposition with regard to supporting literature and follow-up with written discovery demands. A lack of literature supporting an opinion can be fatal in and of itself;

b. Ensure your expert has literature and can articulate a cogent rationale for why plaintiff's expert's causation theory is unsupported, *i.e.*, no scientific basis, no tests, and alternative causes;

c. Do not accept plaintiff's expert's effort to glance by the causation question. Demand the facts (study results, etc.) and how they demonstrate how the breach proximately caused the injury;

d. File a motion seeking a hearing with the judge assigned to the trial and support your motion enough to demonstrate its good-faith basis without providing all of your cross-examination material. This should be done at or around the dispositive motion deadline or at the deadline for motions in limine at the latest;

e. Be specific in requesting a hearing at which live witnesses will be called and contact the judge assigned to the motion to ensure it is understood that witnesses may testify;

f. **Be prepared for a live hearing. You must have witnesses and literature too.**

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