The
MARYLAND LITIGATOR

MSBA LITIGATION SECTION JANUARY 2013

Message from the Chair

By James E. Dickerman

The Litigation Section has had a busy Fall and is anticipating an active Spring. In November, the Litigation Section presented a program directed to young practitioners regarding arguing motions for summary judgment. In addition to lectures by experienced practitioners and tips from a panel of judges, the participants in the program had an opportunity to argue in support of and against summary judgment in front of real judges and receive feedback in a supportive educational environment. The Chair of the program, Robert Fiore, Esquire, deserves credit for putting on a tremendous program. In addition, the Litigation Section co-sponsored with the Construction Law Section a program featuring the Honorable Paul Grimm on the admissibility of opinion testimony in State and Federal construction cases.

This Spring, the Litigation Section is planning several programs. First, in conjunction with the Appellate Law Section, the Section is presenting a program on March 13, 2013 on effective advocacy in Maryland appellate courts. The panel will consist of distinguished judges and practitioners. In addition, on April 4, 2013, the Litigation Section will be sponsoring the Dinner with the Judges Program. This program will include hot tips from various appellate judges and an opportunity to socialize with judges from the various appellate courts. At that program, the Litigation Section will be announcing its recipient of its Judge of the Year award. The Litigation Section is also working on two different programs to present at the year-end meeting in Ocean City.

In addition to programs, the Litigation Section is in the process of putting out another edition of *The Litigator*. If you have any ideas for articles or interest in participating, please contact the editor, Jonathan Kagan, Esquire at "jkagan@bkglawfirm.com".

A subcommittee of the Litigation Section is in the process of reviewing the Maryland Discovery Guidelines to offer suggestions for a long overdue revision. The Section is also actively reviewing proposed legislation to offer its views on any bills affecting litigation practice in Maryland.

The Litigation Section is still taking nominations for the Litigator of the Year. The deadline is April 1, 2013. The forms for nominating someone for Litigator of the Year are located on the Litigation Section's website.

Finally, on February 27, 2013, the Litigation Section is conducting a long-range planning meeting to discuss the future direction of the Section. If you have ideas regarding the Section, including topics for programs or articles or other activities that you think the Section should be involved in, please contact me at "dickerman@ewmd.com" so your ideas can be discussed at the meeting.

I look forward to a productive Spring.

Keep up to date with the Litigation Section E-mail Discussion List!

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Highlights of New Changes to the Maryland Rules

By Steven M. Sullivan[1]

As provided in two Rules Orders issued by the Court of Appeals on October 4, 2012, and November 1, 2012, several changes to the Maryland Rules went into effect on January 1, 2013, including a new and expanded Title 17, Alternative Dispute Resolution ("ADR"). One set of amendments affects both civil and criminal procedure by expanding the scope of persons who will have standing to seek protective orders pertaining to subpoenas and other forms of discovery (Rules 2-403, 2-510, 3-510, 4-262, 4-263, 4-266). Other notable revisions affecting civil procedure include amendments to Rules governing pleading requirements for damages claims (Rules 2-305 and 3-305), plaintiffs' duty to identify, locate, and name "use plaintiffs" in wrongful death actions (Rule 15-1001), intervention (Rule 2-214), and payment of attorneys' fees for representation of an estate in litigation (Rule 6-416). In criminal procedure, New Year's Day ushered in significant amendments addressing conditional guilty pleas (Rules 4-242 and 4-243), the time for filing a motion for new trial based on newly discovered evidence (Rule 4-331(c)(1)), a court's power to revise a conviction for prostitution where the defendant was a victim of human trafficking (Rule 4-331(b)(2)), expungement of records of criminal charges after transfer to juvenile court (Rule 4-501, Form 4-504.1, and rescission of Rule 11-601), and procedures following dismissal of an appeal to circuit court from a District Court conviction (Rule 7-112(f)(4)).

New Title 17, Alternative Dispute Resolution

Effective January 1, 2013, the Court of Appeals rescinded both the prior version of Title 17 in its entirety and Rule 9-205 (court-ordered mediation in child custody and visitation) and replaced them with revised versions that reorganize and expand upon the former Rules while adding some entirely new provisions. The objective of this revision is to consolidate in one Title nearly all of the provisions governing court-ordered ADR, while retaining only a limited number of provisions elsewhere in the Rules to address ADR in certain specialized areas, including child custody and visitation (*see* revised Rule 9-205) and foreclosure actions (*see* Rule 14-212, as newly amended).

The revised Title 17 is divided into three Chapters: Chapter 100 (General Provisions), Chapter 200 (Proceedings in Circuit Court), and an entirely new Chapter 300 (Proceedings in District Court). Two additional Chapters, 400 and 500, have been reserved for future Rules that will address ADR in the Court of Special Appeals and orphans' courts, respectively.

Those already familiar with the prior Title 17, which applied only in circuit court proceedings, will recognize most of the substance of the revised general provisions in Chapter 100 and the circuit court provisions in Chapter 200. Significant innovations in Chapter 200 include provisions (1) prohibiting a court from ordering referral to ADR in a protective order action under the domestic violence provisions in Title 4, Subtitle 5 of the Family Law Article (*see* Rule 17-201(b)); (2) requiring that an order of referral to ADR must specify a maximum number of hours of required participation by the parties (Rule 17-202(e); (3) and requiring that any order of referral for

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November 2012 Litigation Skills Workshop is a Great Success

On November 12, 2012 the Litigation Section Program Committee in conjunction with the MSBA CLE Department presented a half-day litigation skills workshop focusing on summary judgment motions practice. This workshop afforded Section members, (particularly our younger lawyers), a unique opportunity to refine their motions drafting and oral argument competencies in a realistic courtroom environment. The program, limited to forty-six participants, was quickly sold out after registration opened.

The program, conducted at the Borgerding District Court Building on Wabash Avenue in Baltimore, featured five Maryland appellate and circuit court judges who offered invaluable "views from the bench" on summary judgment practice and answered participants' questions on the topic. Additionally, four practicing attorneys offered best practice guidelines for the drafting and arguing of written motions for and against summary judgment as well as for preserving issues for appellate review.

Each participant was then invited to actually argue and oppose a motion for summary judgment, (based on written materials adapted from an actual lead paint tort case decided by the Court of Special Appeals in an unreported opinion), before one of the five judges, who then gave suggestions to refine the participant's oral advocacy skills or to sharpen the focus of the presentation.

This is the third consecutive year that a litigation skills workshop has been offered primarily to Section members by the Litigation Section Program Committee. Prior workshops addressing District Court practice and the presentation of expert witnesses in Circuit Court have been well-received equally.

Many thanks to the Judges and attorneys who served on the faculty for this year's program: Hon. Glenn T. Harrell, Jr. Court of Appeals; Hon. Stuart R. Berger, Court of Special Appeals; Hon. Richard S. Bernhardt, Howard County Circuit Court; Hon. Philip T. Caroom, Anne Arundel County Circuit Court; Hon. Albert Willis Northrup; Prince George's County Circuit Court; Alice M. Collins, Eccleston and Wolf; Gwen D'Sousa, D'Sousa Law Office; Robert Graham Fiore, Fiore, Krause, Crogan & Lopez; J. Bradford McCullough, Lerch, Early & Brewer; and Michael F. Smith, The Smith Appellate Law Firm.

UPCOMING PROGRAM

Maintaining Your Appeal – effective appellate advocacy and practice in the Court of Appeals and the Court of Special Appeals.

On March 13, 2013, at the Court of Appeals in Annapolis, join experienced appellate judges and attorneys for an evening of networking, dialogue, and presentations on the essential skills, strategies, and pitfalls of practice in Maryland's appellate courts. The program will include tips on writing persuasive briefs and delivering effective oral arguments. The speakers will also discuss the inner workings of Maryland's appellate courts, petitions for writs of certiorari, and why effective appellate advocacy starts in the trial court. This program is for everyone whose practice involves matters that could end up before an appellate court, including civil litigators, family law practitioners, employment lawyers, and members of the criminal bar.

See Details for this Program on Page 20

Program Co-Chairs and Moderators:

- **J. Bradford McCullough, Esquire, Lerch, Early & Brewer, Chtd. (jbmccullough@learchearly.com)**
- **Michele J. McDonald, Assistant Attorney General and Principal Counsel, Maryland Workers' Compensation Commission (mmcdonald@wcc.state.md.us)**

Potential Pitfalls in Conditional Joint Tort-feasor Releases: The Court of Appeals Speaks

By Jean E. Lewis[1] and Brian F. Ulwick[2]

In *Swigert v. Welk*, 213 Md. 613 (1957), the Court of Appeals held that it was error to dismiss a settling defendant from a case over a non-settling defendant's objection, where the settling defendant's release did not stipulate to joint tort-feasor status. Given the significant, potential impact on any judgment against the non-settling defendant under the Uniform Contribution Among Tort-feasors Act ("UCATA"), the Court concluded that the non-settling defendant had the right to retain the settling defendant in the case to establish its joint tort-feasor status. Since that decision some 50 years ago, practitioners have debated *Swigert*'s reach and the proper operation of conditional joint tort-feasor releases. Some have asserted that statements in *Swigert* suggest that a non-settling defendant has no ability to recover contribution from a settling defendant and that, accordingly, a non-settling defendant is effectively required to establish a settling defendant's joint tort-feasor status at the initial trial, when a reduction in any judgment is still possible. Others have cautioned that *Swigert* addresses only the right of a non-settling defendant to keep a settling defendant in the initial trial, and says nothing regarding a non-settling defendant's post-judgment rights. Recently two circuit court judges confronted these issues in two actions involving the same parties and the same conditional release, and reached opposite conclusions regarding the effect of a conditional release on the ability of the non-settling defendant to bring a contribution claim against the settling defendant after judgment was entered against the non-settling defendant. In *Mercy Medical Center v. Julian*, 56 A.3d 147 (2012), the Court of Appeals addressed the conflict and put to rest the belief by some practitioners that a *Swigert* release preempts a contribution claim against a released defendant. The Court, however, left unresolved the practical effect of such a claim, an issue practitioners will want to take into account when considering a conditional joint tort-feasor release.

I. The Procedural Background: Two Defendants, One Settles, The Other Goes to Trial, But Does Not Cross-Claim

Wycinna and Christopher Spence ("the Spences") filed a medical malpractice suit against Mercy Medical Center ("Mercy") and Dr. Emerson R. Julian, Jr. ("Dr. Julian"), alleging negligence and the wrongful death of their son. Prior to trial, the Spences settled with Mercy and entered into a "*Swigert*" release agreement. That agreement provided that Mercy was not "deemed" a joint tort-feasor for purposes of the agreement and that no other party would be entitled to any reduction in their liability to the Spences unless and until Mercy was adjudicated a joint-feasor. Consistent with the release provided in *Swigert v. Welk*, however, the agreement also provided that if Mercy was adjudicated a joint tort-feasor, then any other joint tort-feasors' liability would be reduced by Mercy's pro rata share of liability pursuant to UCATA § 3-1405. Mercy was subsequently dismissed from the case, and the trial proceeded against Dr. Julian alone. Apparently deciding that he had a better chance without Mercy in the courtroom, Dr. Julian did not file a cross-claim against Mercy. Nonetheless, the jury found for the Spences, and the trial court eventually entered a $2,186,342.50 judgment against Dr. Julian.

II. After Losing to Plaintiff at Trial, Can Defendant Sue for Contribution? Two Circuit Courts Disagree

After satisfying the judgment against him, Dr. Julian filed an action against Mercy seeking contribution. Mercy opposed, and in a separate action, the Spences sued Dr. Julian again, seeking a declaration that Dr. Julian was not entitled to contribution from Mercy and that he should have filed a cross-claim against Mercy in the initial trial. Two different circuit court judges assigned to the two matters reached diametrically opposed conclusions as to whether Dr. Julian could pursue contribution against Mercy under the circumstances.

III. The Appeals: Majority of Court of Appeals Holds Contribution Action Allowed

The cases were consolidated on appeal for consideration of whether "a non-settling defendant is required to litigate [a] settling defendant's joint tortfeasor status in the underlying action" when the settling defendant has obtained a conditional joint tort-feasor release. [3] The Spences and Mercy argued that Dr. Julian could only have Mercy's joint tort-feasor status adjudicated during the original action, and that Dr. Julian had waived his right to seek contribution by his inaction. Dr. Julian countered that he retained the option to establish Mercy's joint tort-feasor relationship in a separate contribution action.

The Court of Special Appeals, in an opinion written by Judge Graeff, concluded that Dr. Julian was not required to establish

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The Aftermath of *Tracey v. Solesky*- A Federal Lawsuit and Proposed Legislation

By Robert Graham Fiore[1]

In *Tracey v. Solesky*, 427 Md. 627 (2012), *modified*, 427 Md. 664 (2012), the Maryland Court of Appeals ruled that purebred pit bulls are "inherently dangerous" and that landlords can potentially be held strictly liable if a pit bull attacks a person on their property.

The Maryland General Assembly made an unsuccessful attempt to revise this ruling in a special legislative session called in mid-August 2012 but is trying again in 2013. In mid-January, House Bill 78 and Senate Bill 160 were introduced as "emergency bills" for the purpose of establishing that, in an action against an owner of a dog for damages for personal injury or death caused by a dog, evidence that the dog caused such injury or death would create a rebuttable presumption that the owner knew or should have known that the dog had vicious or dangerous propensities; and establishing that common law prior to April 1, 2012, is retained as to owners of real property and certain other persons who have a right to control the presence of a dog on property without regard to the breed or heritage of the dog. Both draft bills state the intent of the General Assembly under the new Act is to abrogate the holding of the Maryland Court of Appeals in *Tracey*.

Meanwhile, a task force group of Maryland lawmakers appointed by the Maryland Senate President and House Speaker has been charged with reviewing the *Tracey* ruling. The task force met in late October of 2012 with a goal of developing a policy approach that recognizes responsible dog ownership while protecting the general public from dangerous animals and dangerous owners.

A central issue in the controversy over the *Tracey* opinion is the vagueness of the term "pit bull," which is not a clearly defined or a recognized standard breed of dog. A class action Complaint seeking injunctive and declaratory relief has been filed in the United States District Court for the District of Maryland that addressed this issue, captioned *Weigel v. State of Maryland*, (Case No.: 1:12-cv-02723-WDQ). Plaintiffs in *Weigel* sued on behalf of low-income dog owners at Armistead Gardens in Baltimore against the State of Maryland, its Governor and Attorney General, the Court of Appeals and its Chief Judge, and against the Armistead Homes Corporation.

The *Weigel* Complaint alleges that in response to the *Tracey* opinion, Armistead Homes notified the proposed class members that they are in violation of their lease and under the provisions of their membership in the cooperative association were immediately subject to termination.

In nine separate counts, the *Weigel* Complaint alleges against all defendants, (other than Armistead Homes), that the "unconstitutionally vague" *Tracey* opinion violates the plaintiffs' of their Fourteenth Amendment rights under the United States Constitution and their rights under Article 24 of the Maryland Declaration of Rights and that it is "so overwhelmingly arbitrary and irrational" as to violate the Due Process Clause and Article 24. Plaintiffs also allege that the opinion amounts to a "seizure of property" in violation of the Fifth Amendment and in violation of Article III, Section 40 of the Maryland Constitution.

The *Weigel* Complaint seeks a Declaration that the *Tracey* opinion is "unconstitutional, void an unenforceable" and that eviction of Armistead Homes tenants based on the *Tracey* opinion should be "preliminarily and permanently" restrained.

A motion filed on behalf of the State, the Court of Appeals, the Governor, the Attorney General and the Chief Judge of the Court of Appeals seeks to have the Complaint dismissed on several grounds: (1) the defendants enjoy immunity from plaintiffs' claims; (2) the claims are not ripe for review; (3) the Complaint fails to state a claim upon which relief can be granted; and (4) plaintiffs should raise their constitutional claims in state court eviction proceedings. The motions are pending before the Honorable William D. Quarles, Jr.

(Endnotes)
1 Robert Graham Fiore, is the Managing Attorney of Fiore, Krause, Fizer, Crogan & Lopez

JOIN A SUB-COMMITTEE

The Litigation Section Council has updated the Litigation Section's sub-committees. The current sub-committees are: Appellate Practice, Federal Court, Programs, the Newsletter and Technology. All of the sub-committees welcome new members who are interested in becoming more involved with the Section. If you would like more information regarding a particular sub-committee, or if you would like to join a sub-committee, please contact our Section Chair, James Dickerman at dickerman@ewmd.com.

JURORS WHO LIE ON VOIR DIRE

*BY NEIL J DILLOFF AND MELISSA RUBIN ROTH**

You have spent several hours selecting a jury in a civil case. In accordance with the usual Maryland procedure, the jurors were sworn and the trial judge conducted the voir dire, permitting counsel to ask only a few follow-up questions. One question the court asked the potential jurors is whether they ever have been a plaintiff or defendant in a civil or criminal case. Some answer affirmatively and are questioned at the bench. Others remain silent. A jury is selected.

Overnight, you discover that three of the jurors have failed to disclose their prior involvement in litigation. The next morning, you bring this to the attention of the court. Further voir dire is conducted and each of the jurors, after some prodding, admits their litigation histories. One says he didn't hear the question. One says she thought that since her litigation had been resolved several years ago, there was no need to disclose it. The third provides no excuse. You have already used your peremptory challenges. Accordingly, you now challenge the three jurors for cause. You tell the judge that because neither opening statements nor any evidence have yet been presented, now is the time to replace these jurors.

What is the test for granting a challenge for cause under these circumstances? Should there be a difference in the test for civil and criminal trials? Does timing of the discovery of the nondisclosure matter? What type of nondisclosure is "material?" Does intent matter? These are important questions, given that studies have shown that up to 39% of jurors admit to concealing information during voir dire.[1]

1. <u>The Test</u>

a. <u>Maryland</u>

Maryland appellate courts have not rendered any decisions on this precise issue in a civil case. There have been several criminal case decisions. In *Burkett v. State*, 21 Md. App. 438 (1974), a juror failed to disclose that his daughter was a secretary in the trial section of the State's Attorney's Office that was prosecuting the defendant. This failure to disclose was only discovered after the defendant had been convicted. After a post-trial hearing that included testimony from the juror, the trial court denied the motion for a new trial, finding that the failure to disclose was inadvertent, the juror's daughter's position with the State's Attorney's office did not influence the juror's decision, and the juror had not discussed the case with his daughter. The Court of Special Appeals affirmed.

Similarly, in *Leach v. State*, 47 Md. App. 611 (1981), a juror did not disclose her acquaintanceship, as a classmate and neighbor, fifteen years earlier, with a State witness, who was one of the investigating homicide detectives. The trial court conducted further voir dire and refused to strike the juror after the juror testified that she could be fair and impartial. She sat on the jury and the defendant was convicted.

However, in *Williams v. State*, 394 Md. 98 (2006), in a case of "first impression" for the Court of Appeals, the Court granted a new trial. It agreed with the "analytical construct"

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The Second Edge of the Maryland Lawyers' Rules of Professional Conduct

By James N. Gaither, Assistant Bar Counsel
Attorney Grievance Commission of Maryland

Violation of a Rule of the Maryland Lawyers' Rules of Professional Conduct (hereinafter "MLRPC") does not itself give rise to a cause of action against a lawyer nor does it create any presumption that a legal duty has been breached. Scope, MLRPC, Comment [20]. In addition, violation of a Rule does not necessarily warrant any other non-disciplinary remedy, such as disqualification of a lawyer in pending litigation. *Id.* Moreover, the purpose of disciplinary proceedings against an attorney for violation of the Rules of Professional Conduct is not to punish the lawyer or *to provide a basis upon which to impose civil liability*. *Attorney Grievance Comm'n v. Monfried*, 368 Md. 373, 394, 794 A.2d 92, 104 (2002) (citing *Post v. Bregman*, 349 Md. 142, 168, 707 A.2d 806, 819 (1998)) (emphasis added). As is noted in the Scope of the Preamble of the MLRPC, however, in some circumstances, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct. Nevertheless, "the judiciary must be extremely careful not to abuse its autonomy by extending the application of the rules it promulgates into areas not within its primary authority..." *Post v. Bregman*, 112 Md. App. 738, 762, 686 A.2d 665, 676 (1996), *rev'd and remanded*, 349 Md. 142, 707 A.2d 806 (1998).

The question of whether ethical rules are enforceable outside of disciplinary proceedings stems from the larger question of whether such rules constitute public policy. *Goldman, Skeen & Wadler, P.A. v. Cooper, Beckman & Tuerk, L.L.P.*, 122 Md. App. 29, 41, 712 A.2d 1, 6 (1998). The issue is whether the MLRPC constitutes a cognizable and enforceable statement of public policy, equivalent in effect to a statute. *Post*, 349 Md. at 162, 707 A.2d at 815. In Maryland, unlike in many other jurisdictions, the Rules contained in the MLRPC do not constitute "self-imposed internal regulations." *Id.* "[The MLRPC] are not precatory guidelines adopted by lawyers or by lower levels of the court system, but are rules adopted by [the Court of Appeals] in the exercise of its inherent Constitutional authority to regulate the practice of law." *Id.* at 162-63, 707 A.2d at 815-16 (citing *Attorney General v. Waldron*, 289 Md. 683, 426 A.2d 929 (1981) and referring to Md. Rule 16-812). The conclusion of the Court of Appeals in *Post* was that the MLRPC are a statement of public policy by the only entity having the Constitutional authority to make such a statement, and that the MLRPC have the force of law. *Id.* at 164, 707 A.2d at 816 (analogizing with *In re Vrdolyak*, 560 N.E.2d 840, 845 (Ill. 1990) ("as an exercise of this court's inherent power over the bar and as rules of court, the Code operates with the force of law.").

"From the dawn of the common law tradition in England, courts have refused to implement those private contractual undertakings which, when measured against the prevailing mores and moods of society, contravene judicial perceptions of so-called 'public policy.'" *Maryland-National Capital Park & Planning Com. v. Washington Nat'l Arena*, 282 Md. 588, 605, 386 A.2d 1216, 1228 (1978). Considerations of public policy are paramount to private rights and where conflict between the two exists, private interests must yield to the public good. *Id.* In Maryland, it is well-established that a contractual provision that is in violation of public policy, to the extent of the conflict, is invalid and unenforceable. *Post*, 349 Md. at 161, 707 A.2d at 815.

The Court in *Post* specifically examined the extent to which the MLRPC were enforceable outside the disciplinary context, and the extent to which Rule 1.5(e) governed private fee-sharing agreements entered into by lawyers. The Court determined that MLRPC Rule 1.5(e) does constitute a supervening statement of public policy to which fee-sharing agreements by lawyers are subject, and that the enforcement of Rule 1.5(e) is not limited to disciplinary proceedings. *Id.* at 168, 707 A.2d at 818. Additionally, the *Post* Court found that Rule 1.5(e) may extend to holding fee-sharing agreements in clear and flagrant violation of Rule 1.5(e) unenforceable. *Id.* ("[F]ollowing the observation of the California court in *Scolinos v. Kolts*, 37 Cal. App. 4th 635, 640, (1995), it would indeed be at least anomalous to allow a lawyer to invoke the court's aid in enforcing an unethical agreement when that very enforcement, or perhaps even the existence of the agreement sought to be enforced, would render the lawyer subject to discipline.").

The analysis in *Post*, in analyzing the applicability of the MLRPC in non-disciplinary cases, noted that Maryland courts have, in the past, applied provisions of the MLRPC in both civil and criminal cases. The *Post* Court stated:

> In *Advance Finance Co. v. Trustees*, 337 Md. 195, 652 A.2d 660 (1995), for example, we applied MLRPC Rule 1.15 in determining that a lawyer was a fiduciary for purposes of sustaining a claim against the Client Security Trust Fund. In *Harris v. Baltimore Sun*, 330 Md. 595, 625 A.2d 941 (1993), an action under the Public Information Act, we applied Rule 1.6 (Confidentiality of Information) to determine whether the Public Defender, as an attorney, had an obligation to release information relating to one of his clients under that Act. In *Prahinski v. Prahinski*, 321 Md. 227, 241,

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Dram Shop Liability in Maryland

By Sarah D. Mann, Esq. [1]

When discussing "dram shop liability," we often mean the liability of a tavern or vendor of alcohol for injuries caused by an intoxicated patron. For decades, vendors of alcohol in Maryland have been insulated from such liability. Yet, until recently, Maryland had not considered the potential liability of a tavern for injuries caused by or to an intoxicated patron, when there is tavern conduct beyond merely over-serving an intoxicated patron.

While we continue to discuss the potential liability of a tavern or vendor of alcohol in the context of "dram shop liability," recent decisions actually consider that liability in the purview of negligence. In recognizing tavern liability in certain situations, these cases seem to fly in the face of earlier Maryland dram shop cases; however, a closer look leads to a different conclusion.

In 1951, Maryland first adopted the common law rule that a party injured by a person intoxicated by alcohol does not have a cause of action against the vendor who sold the alcohol.[2] In *State v. Hatfield*, the plaintiff brought suit against a tavern that sold alcohol to a minor patron and then permitted the minor to leave the premises, despite that the minor was intoxicated.[3] After leaving the premises, the patron operated his vehicle and was involved in a collision.[4]

In dismissing the cause of action, the Maryland Court of Appeals held that:

> A part from statute, the common law knows no right of action against a seller of intoxicating liquors, as such, for "causing" intoxication of the person whose negligent or wilful [*sic*] wrong has caused injury. Human beings, drunk or sober, are responsible for their own torts. The law (apart from statute) recognizes no relation of proximate cause between a sale of liquor and a tort committed by a buyer who has drunk the liquor.[5]

Despite dismissing the lawsuit, the *Hatfield* Court seemed to recognize that liability could attach when a tavern serves alcohol to an intoxicated patron and then creates a situation that is likely to cause harm to the intoxicated patron or to others.[6] The Court of Appeals cited to *Dunlap v. Wagner*,[7] an old Indiana case that addressed whether an individual who causes another individual to become intoxicated and then places him in a sleigh, after that man is intoxicated and unconscious, is liable to the owner of a horse drawing the sleigh that is killed as a result.[8]

The *Dunlap* Court found that, "[a] man who, in violation of law makes another helplessly drunk, and then places him in a situation where his drunken condition is likely to bring harm to himself or injury to others, may well be deemed guilty of an actionable wrong independently of any statute."[9]

The *Hatfield* Court, in discussing *Dunlap*, explained that, "[w] e may assume, without deciding, that on such facts the defendant would be 'guilty of an actionable wrong independently of any statute,' not, however, for making the driver drunk by selling him liquor, but for placing him bodily, in a state of unconsciousness, in the sleigh and starting the horses."[10] The Court emphasized that it was not "alleged that the defendants knew, or the fact was, that none of the other persons in [the intoxicated patron's] automobile was able, and in a fit condition, to drive it, or that defendants knew [the intoxicated patron] intended to drive it."[11]

Thirty years later, the Court of Appeals was charged with determining whether, "Maryland should now recognize a right of action in tort against a licensed vendor of intoxicating beverages for injuries negligently caused by an intoxicated patron to an innocent third party."[12] In *Felder v. Butler*,[13] the plaintiffs alleged that the tavern served intoxicating liquors to the already intoxicated patron and that, as a direct and proximate result, the plaintiffs were injured in a subsequent motor vehicle accident.[14]

In considering whether the common law should be changed with regard to dram shop liability, the Court of Appeals said:

> Of course, the common law is not static. Its life and heart is its dynamism -- its ability to keep pace with the world while constantly searching for just and fair solutions to pressing societal problems like that presented by the senseless carnage occurring on our highways, due in no small measure to the drinking driver. The common law is, therefore, subject to modification by judicial decision in light of changing conditions or increased knowledge where this Court finds that it is a vestige of the past, no longer suitable to the circumstances of our people.[15]

The *Felder* Court nevertheless declined to create a civil cause of action against vendors of alcohol because, just as was the case thirty years earlier when *Hatfield* was decided, the Maryland legislature had not yet created shop liability.[16] However, in concluding its decision, the Court of Appeals invited the legislature to consider whether public policy "continues to favor a rule which, in any and all circumstances, precludes consideration of whether the sale of intoxicating liquor to an inebriated tavern patron may be a proximate cause of subsequent injury caused to others by the intoxicated customer."[17]

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EXPANDING *FRYE-REED* BEYOND THE *NOVEL* AND THE *SCIENTIFIC*

BY THOMAS K. PREVAS[1]

Maryland litigators should look beyond the traditional rule that *Frye-Reed* applies only to *novel scientific* evidence when considering whether to request a hearing. While the *novel scientific* rule relates to a time when appellate courts, rather than trial courts, assumed the role of gatekeeper, recent Court of Appeals decisions, such as *Blackwell v. Wyeth*, have placed the onus of assessing the reliability of an expert's opinion firmly in the hands of trial judges. In this vein, both the United States Supreme Court and Court of Appeals have explained that trial judges must assess the reliability of expert opinion on a case-by-case basis, looking at every stage of the analytical process—from underlying methods and assumptions, to analysis to conclusions.

The movement toward a trial-level, case-by-case assessment of reliability eliminates the need for the *novel scientific* restriction and opens the door for litigators to challenge all expert opinions under *Frye-Reed*. Indeed, the Supreme Court already has eliminated the *novel scientific* restriction for *Daubert*.

A. *Frye-Reed*

Maryland Rule 5-702 and *Frye-Reed* govern the admission of expert evidence. Rule 5-702 provides that to be admissible expert testimony must assist the trier of fact in understanding the evidence or determining a fact at issue, based on (1) the expert's qualifications; (2) the appropriateness of the expert testimony on the particular subject; and (3) whether a sufficient factual basis exists to support the expert testimony. As with most evidentiary rulings, appellate courts review 5-702 rulings for abuse of discretion.

Frye-Reed is the common law rule for examining the admissibility of a "novel scientific" technique or method.[2] The test originated with the 1923 "lie-detector" case, *Frye v. United States*, where the United States Court of Appeals for the District of Columbia Circuit held that for a scientific technique to be admissible, it must be "sufficiently established to have gained general acceptance in the particular field in which it belongs."[3] In 1993, *Frye* was overruled by *Daubert*,[4] where the Supreme Court held that trial judges must assess the reliability of expert testimony using a non-exclusive, five-factor checklist—one factor of which is the *Frye* general acceptance standard.

The Maryland Court of Appeals adopted the *Frye* standard in *Reed*—a 1978 "voiceprint spectrograph" case.[5] The Court held that to ensure reliability and validity, "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 particular scientific field."[6] The Court explained the *novel scientific* limitation by observing that that once a particular method or technique was accepted, or not, by the appellate court, it would become accepted as a matter of law in future cases.[7] *Frye-Reed* rulings thus obtained *de novo* appellate review.[8]

B. Evolution of the *Novel*, the *Scientific*, and the Use of *Frye-Reed*

Since *Reed*, the Court of Appeals has used *Frye-Reed* to assess the reliability and validity of a particular expert's opinion, often going beyond the *novel scientific* restriction. In 2006, the Court of Appeals departed from the *novel* limitation in *Clemons v. State*,[9] when it held that the previously accepted comparative bullet lead analysis no longer was generally accepted as reliable in the relevant scientific field.

The *scientific* limitation has also evolved. While the Court of Appeals consistently has applied *Frye-Reed* to traditionally scientific methods or techniques—like medical causation[10] or law enforcement forensic techniques[11]—it has also used *Frye-Reed* to assess an expert's analysis in a non-traditionally scientific field, such as statistics. In *Wilson v. State*, for example, the Court of Appeals disallowed the testimony of the State's expert statistician, who used the "product rule" to opine that the chance of two SIDS-related deaths in the same family was one in four million.[12] Using *Frye-Reed* principles, the Court held that although the product rule is generally accepted, it was not applied in a reliable manner, because it was not generally accepted that the two SIDS-related deaths were mutually exclusive—there could have been a genetic component.[13] Although the Court has justified its use of *Frye-Reed* in such circumstances by pointing to an underlying scientific question (e.g. a genetic component to SIDS),[14] in truth, the Court has used *Frye-Reed* on a case-specific basis, to address whether a particular expert's conclusion can be reliably drawn from an accepted technique or method.

C. *Blackwell v. Wyeth*

In *Blackwell*, the Court of Appeals made explicit that *Frye-Reed* applies not only to the underlying method or technique, but to every stage of an expert's analysis.[15] There, plaintiffs offered the testimony of Dr. Mark Geier, who would have opined about a causal link between Thimerosal in childhood vaccines and autism. Dr. Geier purported to generate his conclusions by using the VAERS epidemiological database. While agreeing that use of the VAERS database is generally accepted for some epidemiological

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fee-for-service ADR must specify the hourly rate that may be charged for ADR services in the action (Rule 17-202(e)), which may not exceed the maximum rate stated in the applicable fee schedule adopted by the county administrative judge of each circuit (*see* Rule 17-208). The rates in the fee schedule will apply only to ADR practitioners initially designated by the court and will not apply where an ADR practitioner is selected by the parties (*see* Rule 17-208(b)).

Chapter 300 provides, for the first time, comprehensive ADR provisions for application in District Court proceedings. Though the District Court ADR provisions mostly resemble those that apply in circuit court, there are some significant differences. Whereas the county administrative judges are responsible for approving applications to serve as mediators in their respective circuit courts (Rules 17-207), persons wishing to serve as court-designated mediators in the District Court must apply for approval by the District Court Alternative Dispute Resolution Office ("ADR Office"), a unit within the Office of the Chief Judge of the District Court (Rule 17-304(c); *see* Rule 17-301). To qualify as a court-designated mediator in District Court, an ADR practitioner must agree to volunteer at least six days in each calendar year as a mediator in the District Court day-of-trial mediation program (Rule 17-304 (a)(8)), in addition to satisfying all of the other requirements set forth in Rule 17-304. Unlike a circuit court's discretion under Chapter 200, a District Court judge is prohibited from requiring any litigants or attorneys to pay a fee or additional court costs for participating in a mediation or settlement conference before a court-designated ADR practitioner (Rule 17-305). In addition, Rule 17-302(a) generally limits the ADR that may be ordered in a District Court case to one non-fee-for service mediation or one non-fee-for-service settlement conference.

Right of Third Parties to Seek Protective Orders in Discovery

A set of amendments to Rules pertaining to both civil and criminal procedure significantly expands the universe of persons who will have standing to seek protective orders pertaining to subpoenas and other forms of discovery. New amendments to Rules 2-510(e) and (f), 3-510(e) and (f), and 4-266(c) will permit a protective order to be requested by and granted to any person named in a subpoena or named or depicted in an item specified in the subpoena. Similar amendments to Rules governing discovery methods other than subpoenas authorize a protective order to be sought by and granted to any person named or depicted in an item sought to be discovered (*see* Rules 2-403, 4-262(m), and 4-263(m)).

CIVIL PROCEDURE
Pleading Damages Claims

Previously, Rule 2-305 generally required that a complaint in circuit court seeking a money judgment must "include the amount sought." The amended Rule 2-305 requires the amount sought to be specified only if the demand for money judgment does not exceed $75,000. If the complaint seeks a greater amount, then the demand "shall not specify the amount sought, but shall include a general statement that the amount sought exceeds $75,000." In District Court, the corresponding provision, Rule 3-305, simply requires that a pleading contain "a demand for judgment for the relief sought."

Responsibilities of Plaintiffs and Use Plaintiffs in Wrongful Death Actions

Rule 15-1001, Wrongful Death, has been significantly revised to reflect the holdings in *University of Maryland Medical Systems Corp. v. Muti*, 426 Md. 358 (May 3, 2012). The *Muti* Court addressed the respective responsibilities of named plaintiffs, their attorneys, and those who may qualify as "use plaintiffs" under Maryland Rule 15-1001 and Maryland's Wrongful Death Statute, Md. Code Ann., Cts. & Jud. Proc. §§ 3-901 – 3-904, especially in light of the statute's "one-action" requirement, *see* § 3-904(f) ("Only one action under this subtitle lies in respect to the death of a person."). A "use plaintiff" is "any person named as a plaintiff who does not join in the action." Rule 15-1001(b).

As newly revised, Rule 15-1001(b) deletes former language that had limited the section's application to suits where "the wrongful act occurred in this State," and a Committee Note to section (a) clarifies that a Maryland court must apply Maryland Rules of pleading and procedure, including Rule 15-1001, irrespective of where the decedent's death occurred. The amended Rule 15-1001(c) adds two new pleading requirements: in addition to the previously required statement establishing "the relationship of each plaintiff to the decedent," the complaint must include "the last known address of each use plaintiff" and a statement that "the party bringing the action conducted a good faith and reasonably diligent effort to identify, locate, and name as use plaintiffs all individuals who might qualify as use plaintiffs." A further amendment to section (c) provides that a complaint may not be dismissed for failure to join all use plaintiffs "if the court finds that the party bringing the action made such a good faith and reasonably diligent effort."

Under the amended notice requirements in Rule 15-1001(d), the

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party bringing the action must "serve a copy of the complaint on each use plaintiff pursuant to Rule 2-121" and accompany the complaint with the form notice set forth in section (d). The form notice includes a warning that the use plaintiff must file any motion to intervene by the earlier of the "statutory deadline," *see* §§ 3-904(g) and 5-201(a) of the Courts Article, or the "served notice deadline," which is equivalent to the time for filing an answer under Rule 2-321. The "waiver by inaction" provision in 15-1001(e) bars a use plaintiff from participating in the action or claim if that person fails to file a complaint or motion to intervene by the statutory deadline, or if the statutory deadline is satisfied but the served notice deadline is not. For good cause shown, a court may excuse the failure to intervene by the served notice deadline, but failure to satisfy the statutory deadline will not be excused. Finally, if despite good faith and diligent efforts to identify and locate all use plaintiffs, an eligible use plaintiff is not identified until after the complaint is filed but before the expiration of the statutory deadline, the "subsequently identified use plaintiff" provision in subparagraph (f) requires that the newly identified use plaintiff be "added by amendment to the complaint as soon as practicable" and served in accordance with Rules 15-1001(d) and 2-341(d).

Intervention

Rule 2-214(c) formerly provided that a motion to intervene must be accompanied by a copy of the proposed "pleading," which as defined in Rule 2-302 would include a complaint, answer, counterclaim, cross-claim or third-party complaint, but would not include a motion or any other type of response. Newly amended Rule 2-214(c) allows a motion to intervene to be filed along with a "pleading, motion, or response."

Payment of a Contingency Fee for an Attorney's Representation of an Estate

Legislation enacted in 2011 permits a decedent's estate, without court approval but subject to certain conditions, to pay fees to an attorney who represented the estate in litigation under a contingency fee agreement. *See* Md. Code Ann., Estates & Trusts § 7-604(a)(2); 2011 Md. Laws, Ch. 80. New Rule 6-416(b)(1) has been adopted to implement the statutory change.

CRIMINAL PROCEDURE
Conditional Guilty Pleas

In response to recent legislation authorizing a direct appeal from a written conditional plea of guilty, *see* 2012 Md. Laws, Ch. 410, new Rule 4-242(d) permits a written conditional plea of guilty to an offense charged by indictment or criminal information and set for trial in a circuit court, including an offense to be tried in circuit court pursuant to a prayer for jury trial entered in the District Court. By entering such a written plea, a defendant may reserve the right to an appeal limited to one or more specified issues that "(A) were raised by and determined adversely to the defendant" and "(B) if determined in the defendant's favor would have been dispositive of the case" (Rule 4-242(d)(2)). If on appeal the defendant prevails on an issue reserved in the plea, the defendant may withdraw the plea (Rule 4-242(d)(3)).

Time for Filing a Motion for New Trial Based on Newly Discovered Evidence

Prompted by a plea for greater clarity expressed in *Matthews v. State* , 415 Md. 286, 298 (2010), a new amendment to Rule 4-331(c)(1) seeks to remedy an ambiguity in the prior language by clarifying that a motion for new trial or other appropriate relief on the ground of newly discovered evidence must be filed within one year after "the later of (A) the date the court imposed sentence or (B) the date the court received a mandate issued by the final appellate court to consider a direct appeal from the judgment or a belated appeal permitted as post conviction relief."

Revisory Power in Cases of Prostitution Committed Under Duress

Legislation enacted in 2011 authorizes a person convicted of prostitution to file "within a reasonable period of time after the conviction" a motion to vacate the judgment "if, when the person committed the act or acts of prostitution, the person was acting under duress caused by an act of another committed in violation of the prohibition against human trafficking under § 11-303 of the Criminal Law Article or under federal law." Md. Code Ann., Crim. Proc. § 8-302, subparagraphs (b)(3) and (a); 2011 Md. Laws, Ch. 218. New Rule 4-331(b)(2) provides that upon the filing of a motion pursuant to Criminal Procedure § 8-302, "the court has revisory power and control over a judgment of conviction of prostitution to vacate the judgment, modify the sentence, or grant a new trial."

Expungement of Records

Legislation enacted in 2012 requires a court to grant a request for expungement of records of criminal charges that were transferred to a juvenile court under Criminal Procedure § 4-202 or § 4-202.2. *See* Crim. Proc. § 10-106, as amended by 2012 Md. Laws, Ch. 563. To conform with the statutory change,

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Mercy's joint tort-feasor status in the underlying action, identifying multiple authorities for the proposition that a defendant in a litigation is not required to raise claims against third parties in the same action.[4] Accordingly, the Court of Special Appeals held that Dr. Julian "retain[ed] the right to pursue an independent contribution claim." [5]

Granting petitions for certiorari filed by the Spences and Mercy, the Court of Appeals agreed to consider:

- whether the UCATA requires a stipulation of joint tort-feasor status to comply with 3-1405 and relieve a settling tort-feasor from liability to pay contribution;
- whether a party with a *Swigert* release could be sued in a later action for contribution; and
- in the event a joint tort-feasor is allowed to pursue a post-judgment action for contribution against a party with a *Swigert* release, whether it may recover money damages from a settling defendant, or is limited to a reduction of the judgment.[6]

In a decision written by Judge Battaglia, the Court of Appeals determined that (1) the conditional release given in a *Swigert* release does not, without more, meet the requirements of section 3-1405 so as to bar a subsequent contribution action by another non-settling joint tort-feasor,[7] and (2) a non-settling joint tort-feasor is not required to bring a cross-claim against a released defendant, and can instead pursue the released defendant's tort-feasor status in a subsequent contribution action.[8] Urged by the Spences and Mercy that *Swigert* required a different result,[9] the Court examined *Swigert v. Welk* and observed that the Spences ignored the key provision of *Swigert*'s holding, that "a party must have been adjudicated liable or have admitted to joint tort-feasor status for the act, and of course, Section 3-1405 [of the UCATA], to apply at all."[10] Put simply, if a release does not result in a reduction of judgment per section 3-1404, then it is not a bar to contribution per section 3-1405.[11] In such a case, the non-settling defendant retains the option of pursuing contribution in a separate action.

IV. The Concurring/Dissenting Opinion: What Happens Next?

Judge McDonald, joined by Judges Harrell and Bell, concurred and dissented from the majority opinion. While agreeing with most of the majority opinion, Judge McDonald's separate opinion questions the majority's decision not to address the practical effects of its answers to the first two questions and, specifically, its decision not to address the third question on which the Court granted certiorari: If Dr. Julian successfully establishes that Mercy was a joint tort-feasor, will he receive a money judgment against Mercy for half of the judgment against him, or will the Spences' judgment against him be reduced?[12] The answer to that question has real-world implications for everyone involved: If Dr. Julian receives a money judgment against Mercy, Mercy will pay half of the judgment against him and be left to pursue reimbursement from the Spences; if, however, the answer is that the Spences' judgment will somehow be reduced subsequent to execution, it will be Dr. Julian (or his insurers) attempting to collect money that may well have already been spent.

To answer Judge McDonald's question, we must go back to the statute, and review the "work-around" permitted by the Court in *Swigert*.

V. The Statutory Scheme and the *Swigert* embellishment

As a general matter, the UCATA allows a joint tort-feasor that has paid more than its share to seek contribution from other joint-feasors. [13] [14] Consistent with this general principle, the UCATA provides that a release of one joint tort-feasor reduces the claim against the other tort-feasors by the amount paid or by the amount

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Form 4-504.1, Petition for Expungement of Records, has been amended accordingly, and the Court of Appeals has rescinded former Rule 11-601, which had contained procedures for the partially discretionary expungement that was available under the former version of Criminal Procedure § 10-106.

Procedures Upon Dismissal of an Appeal to Circuit Court

To address cases where a District Court defendant has been sentenced to a term of confinement and released pending an appeal to circuit court and the appeal is then dismissed, Rule 7-112(f)(4) has been amended to require that the defendant be ordered to appear before a judge and to delete the former option of having the defendant appear before a commissioner. Under the revised Rule, "[i]f a judge is not available on the day the warrant or order is served, the defendant shall be brought before a judge the next day that the court is in session."

(Endnotes)

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provided in the release, typically a pro rata amount.[15] [16] This is important to the settling tort-feasor because § 3-1405 preserves the ability of tort-feasors who have paid more than their "pro rata" share to pursue a settling tort-feasor for contribution unless its settlement provides for a reduction of the injured person's damages recoverable against all other tort-feasors "to the extent of the pro rata share of the released tort-feasor."[17] To the extent the release does not provide for a reduction or provides for some lesser reduction, the other tort-feasors maintain a right of contribution against the released tort-feasor for the difference.[18]

By contrast, a *Swigert* release leaves open the possibility of no reduction of the injured person's damages recoverable from other tort-feasors because the settling tort-feasor does not admit to joint tort-feasor status. This leaves open the possibility that the plaintiff can settle with one or more defendants and still recover his or her full damages from those that have not settled. Of course it also leaves open the possibility that those not included in the settlement will eventually seek contribution from those that settled. Because of the potential benefits for the plaintiff and pitfalls for the settling defendant, a *Swigert* release is not equivalent to a full joint tort-feasor release and typically costs a defendant less than a full joint tort-feasor release.

VI. The Practical Effects of Swigert: More money for Plaintiffs (Maybe), More Risk for the Unwary Defendant

The distribution of gain and loss looks very different depending on whether a settling defendant ("JTF1") is adjudicated a joint tort-feasor. To illustrate, assume that (1) a plaintiff ("Plaintiff") settles with JTF1 for $600,000 and a *Swigert* release (providing for a pro rata reduction for joint tort-feasors if JTF 1's joint tort-feasor status is established), and (2) Plaintiff goes forward in trial against a non-settling defendant ("JTF2") and obtains a $2.2 million jury verdict.

If JTF2 files a cross-claim against JTF1 and establishes JTF1's joint tort-feasor status, the $2.2 million verdict will be reduced to $1.1 million (per 3-1404) and Plaintiff's total recovery will be $1.7 million -- $600,000 from JTF1 and $1.1 million from JTF2. If, however, JTF2 loses its cross-claim against JTF1, Plaintiff reaps the benefits of both the judgment and the settlement, and recovers a total of $2.8 million --$600,000 from JTF1 and $2.2 million form JTF2.

If determination of JTF1's joint tort-feasor status is not determined until after the first trial, Plaintiff ends the first trial with both the settlement and the judgment for a total of $2.8 million. If JTF2 then establishes JTF1's joint tort-feasor status in a contribution action, JTF2 should obtain a $1.1 judgment in contribution against JTF1, per §§ 3-1402 and 1405, decreasing JTF2's liability to $1.1 million or half of the judgment. JTF1, however, will now be $1.7 million out of pocket -- its $600,000 settlement with Plaintiff and the $1.1 million contribution judgment.

JTF1's ability to get back to the deal it bargained for with Plaintiff will depend on the terms of its release agreement with the plaintiff. The release agreement should provide JTF1 with (1) a right of indemnity against the plaintiff for the $1.1 million contribution judgment; (2) the fees and costs of defending the contribution action; and (3) importantly, a requirement that JTF1's pro rata share of any judgment is held in escrow pending resolution of any contribution action, to guarantee that funds are available from Plaintiff. In such a case, JTF1's out-of-pocket is reduced from $1.7 million to $600,000, the amount it settled for, and Plaintiff's total recovery is decreased from $2.8 million to $1.7 million, the same result that would have occurred had JTF2 succeeded in a cross-claim against JTF1 at the initial trial.

It is plain why both JTF1 and Plaintiff would prefer a result that puts most of the loss on JTF2 and maximizes Plaintiff's recovery. But if JTF1 has a strong enough agreement with Plaintiff, it should not matter to JTF1 whether its joint tort-feasor status is established at trial or in a subsequent action. The alternative is to negotiate an unconditional joint tort-feasor release. Because of the potential benefit of a *Swigert* release to Plaintiff, this may cost the settling defendant more.

VII. The Answer to Judge McDonald's Question

Considered against this backdrop, Dr. Julian should be entitled to a money judgment against Mercy for one-half the judgment, if he establishes that Mercy is a joint tort-feasor. Mercy apparently anticipated the possibility of such a result, incorporating in its release agreement a requirement that the Spences hold one-half of any judgment in escrow pending resolution of the contribution action. Accordingly, applying the UCATA and the carefully negotiated terms of the applicable release agreement, if Dr. Julian establishes that Mercy is a joint tort-feasor, he will ultimately be liable for one-half of the judgment, Mercy will pay whatever amount it negotiated, and the Spences will recover one-half of the judgment and the settlement from Mercy -- the same result that would have occurred if Dr. Julian had brought a successful cross-claim.

It is important to note that the protections that Mercy apparently included in its release agreement -- the indemnity and the escrow provisions -- will be critical to its ability to enforce the terms of its release agreement. Defense practitioners would be wise to seek such

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provisions in the negotiation of conditional tort-feasor releases.

(Endnotes)

1 Jean Lewis is a principal at Kramon & Graham, P.A. The opinions expressed herein are those of the authors and not of the firm.

2 Brian Ulwick is a student at Loyola University of Chicago School of Law, Class of 2014.

3 *Spence v. Julian*, 201 Md.App. 562, 579-80 (2011).

4 *Spence*, 201 Md.App. at 587-87 (citing *Lerman v. Heeman*, 347 Md. 439, 445, 46 (1997)) .

5 *Id.* at 589.

6 The Court of Appeals also granted certiorari on two questions posed by the Spences, which largely overlap with the first two questions posed by Mercy. *See Mercy*, 56 A.3d at 149, n5.

7 *Mercy*, 56 A.2d at 159.

8 *Id*. at 163-65.

9 Mercy, for example, interpreted the *Swigert* Court's statement that "Of course, as there can be no recovery by the plaintiff or Swigert against him, whether or not Welk wishes to participate actively in the trial is a matter left for his selection," as a "ruling" that "there [could] be no recovery by the plaintiffs or Swigert against [Welk]."

10 *Mercy*, 56 A.3d at 159.

11 *Id.* at 159-160.

12 *Id.* at 169-170.

13 UCATA, § 3-1402.

14 UCATA, § 3-1402 provides in relevant part:

In general

(a)The right of contribution exists among joint tort-feasors.

Entitlement to contribution

(b) A joint tort-feasor is not entitled to a money judgment for contribution until the joint tort-feasor has by payment discharged the common liability or has paid more than a pro rata share of the common liability.

15 UCATA, § 3-1404.

16 UCATA, § 3-1404 provides:

A release by the injured person of one joint tort-feasor, whether before or after judgment, does not discharge the other tort-feasors unless the release so provides, but it reduces the claim against the other tort-feasors in the amount of consideration paid for the release or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.

17 UCATA, § 3-1405 provides:

A release by the injured person of one joint tort-feasor does not relieve the joint tort-feasor from liability to make contribution to another joint tort-feasor unless the release:

(1) is given before the right of the other tort-feasor to secure a money judgment for contribution has accrued; and

(2) Provides for a reduction, to the extent of the pro rata share of the released tort-feasor, of the injured person's damages recoverable against all other tort-feasors.

18 UCATA, § 3-1405.

Jurors Who Lie...

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set forth by the Court of Special Appeals in *Burkett*, that when the nondisclosure is inadvertent, the issue is left to the sound discretion of the trial judge unless (1) the defendant demonstrates actual prejudice or (2) "the withheld information, in and of itself, gives rise to a reasonable belief that prejudice or bias by the juror against the accused is likely."[2] In *Williams*, the trial court had not questioned the juror about the nondisclosure and therefore could not determine whether there was prejudice.

To date, however, there is no Maryland appellate judicial guidance in a civil case.

b. United States Supreme Court

The United States Supreme Court has taken a conservative approach to the problem. In *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548 (1984), a civil product liability action, a juror failed to answer a question about whether any member of his family had been injured in an accident. The Tenth Circuit reversed the trial court's denial of a motion for a new trial, even though it found that the juror's failure to respond was in good faith. The Supreme Court reversed and upheld the trial court's refusal to grant a new trial. The Court held that to obtain a new trial, (1) the complaining party must demonstrate that the juror failed to answer honestly a material voir dire question, (2) the correct response would have provided a valid basis for a challenge for cause, and (3) only those reasons that clearly affect the juror's impartiality and would adversely affect the fairness of the trial warrant a new trial. In underscoring the deference to the trial court, the Court held that "a litigant is entitled to a fair trial, but not a perfect one. . . ."[3]

c. Other Jurisdictions

Most of the reported state cases have followed a three-part test for determining whether a trial judge's refusal to strike a lying juror for cause constituted error. For example, in *De La Rosa v. Zequeria*, 659 So. 2d 239 (Fla. 1995), Florida adopted the following three-part test: (1) "the complaining party must establish that the information is relevant and material to jury service in the case;" (2) "that the juror concealed the information during questioning;" and (3) "the failure to disclose the information was not attributable to the complaining party's lack of diligence."[4] This test has been adopted by various other jurisdictions.

2. Should There be a Difference Between Civil and Criminal Trials?

A litigant should be entitled to an unbiased jury and the op-

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portunity to make an informed decision on strikes. From this perspective, there should be no difference between civil and criminal trials. However, it appears easier to prevail as the complaining party in a criminal setting than in the civil arena. In criminal cases, the Sixth Amendment, which guarantees a criminal defendant the right to an impartial trial, comes into play.[5] Article 21 of the Maryland Declaration of Rights provides a similar guarantee. There is no such counterpart in the civil context.

3. Timing of the Discovery of the Nondisclosure

In the example above, trial counsel discovered the nondisclosure before opening statements and the presentation of evidence. Thus, it would have been simple for the trial judge to excuse the dissembling jurors and replace them with others from the jury pool. However, what is the appropriate course of action when discovery of the nondisclosure occurs during the trial or after the trial? Obviously, in such circumstances, there is an understandable reluctance to declare a mistrial and start over. However, the adverse effect is the same (and perhaps greater if the lying juror has discussed the case with other jurors).

4. Materiality of the Nondisclosure

To establish materiality of the nondisclosure, the proponent of the new trial must show that the concealed information was directly pertinent to the case at hand (i.e., prior car accident case in an auto tort case) and that the concealed information, if it had been disclosed, would in all likelihood have resulted in a peremptory challenge.[6] "Materiality involves a matter to which counsel reasonably would have given 'substantial weight' in the exercise of peremptory challenges."[7] Other courts conclude that a disclosure is material if it would also supply the basis for a valid challenge for cause.[8]

One could take the position that every voir dire question asked by a trial judge meets the materiality standard. Nondisclosure of a juror's prior litigation experience has been held to be material.[9] It is the authors' experience that most Maryland trial judges are reluctant to spend extensive time in jury selection – hence they do the questioning themselves. If this materiality premise is correct, then any juror who conceals information regarding any question should be stricken. In reality, this probably is an overly expansive standard.

5. Intentional versus Inadvertent Nondisclosure

One open issue is whether the juror's nondisclosure must be shown to be intentional. Certainly, if there is an intent to conceal, that would strengthen the challenge for cause. Most courts hold that a juror's intentional withholding of material information during voir dire warrants a new trial.[10]

Even if the nondisclosure is negligent, however, the effect is still detrimental: it precludes trial counsel from having relevant knowledge about the juror. In situations where the juror claimed not to have heard the question, there must be a supporting basis in the record.[11] There is a presumption that all the potential jurors heard the questions; otherwise, collective questioning of the proposed venire would be precluded and each individual juror would have to be questioned separately.[12]

6. Conclusion

A juror's failure to disclose material information, whether intentional or not, should usually result in the excusal of the juror for cause if the discovery is made before the case goes to the jury. If the concealment is discovered after the trial has concluded, the proper remedy is more difficult. If the concealment was intentional, a new trial should usually be granted. If the concealment was negligent, then, depending on the circumstances, it may constitute harmless error. While the issue of a new trial is the discretion of the trial judge, a brighter line would be helpful.

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(Endnotes)
1 See Kristin D. Clardy, *Judicial Confusion and Inconsistency in Handling Juror Misconduct: A New Proposal*, 17 Wm. & Mary Bill of Rts. J. 895 (2009) (citation omitted).
2 *Id.* at 101 (quoting *Burkett*, 21 Md. App. at 445).
3 *Id.* at 553 (citations omitted).
4 *Id.* at 241 (citing *Skiles v. Ryder Truck Lines, Inc*., 267 So. 2d 379, 380 (Fla. 2d DCA 1972)).
5 *See Attorney Grievance Commission v. Gansler*, 377 Md. 656, 675 (2003).
6 *See De La Rosa*, 659 So. 2d at 242.
7 *Morgan v. Milton, Nos. 1D11-2242, 1D11-3649*, 2012 WL 4872518, *2 (Fla. App. 1st Dist. Oct. 16, 2012).
8 *Wilcox v. Dulcom*, 690 So. 2d 1365 (D.C.A. 3rd 1997).
9 *Doyle v. Kennedy Heating and Service, Inc*., 33 S.W. 3d 199 (Mo. App. 2000).
10 See, e.g., *Williams v. True*, 39 Fed. Appx. 830, 2002 WL 1357162 (4th Cir. June 21, 2002) (unpublished); *Conference America, Inc. v. Telecomm. Corp. Network*, 885 So. 2d 772 (Ala. 2003).
11 *De La Rosa*, 659 So. 2d at 241-42.
12 *Id.* at 242.

> 582 A.2d 784, 791 (1990), we applied Rule 5.4(b) and (d), precluding a lawyer from forming partnerships for the practice of law with persons who are not lawyers, in holding that a non-lawyer spouse "has no interest in the lawyer-spouse's practice and therefore the goodwill of the practice may not be included as marital property." In *Harris v. Harris*, 310 Md. 310, 529 A.2d 356 (1987), the trial court in a worker's compensation case disqualified the claimant's lawyer on the ground that his continued representation would be in violation of MLRPC Rule 3.7, which precludes a lawyer from acting as advocate in a case in which the lawyer is likely to be a necessary witness. Though dismissing the appeal as non-allowable from the interlocutory pretrial order, we stated that "in further proceedings in this case counsel's conduct will be governed by Rule 3.7...." *Id.* at 320, 529 A.2d at 361. *See also Medical Mutual v. Evans*, 330 Md. 1, 32, 622 A.2d 103, 118 (1993). In *Cardin v. State*, 73 Md. App. 200, 533 A.2d 928 (1987), the Court of Special Appeals held that the violation by a lawyer charged with theft of former Disciplinary Rule 2-107 -- the predecessor of MLRPC Rule 1.5(e) -- could be considered by the jury in determining whether the lawyer had criminal intent in receiving the funds alleged to be stolen. The Court of Special Appeals and the U.S. District Court for the District of Maryland have applied MLRPC Rules 1.7 and 1.9 (Conflict of Interest) in determining whether to strike the appearance of counsel in collateral litigation. *Tydings v. Berk Enterprises*, 80 Md. App. 634, 565 A.2d 390 (1989); *Gaumer v. McDaniel*, 811 F. Supp. 1113 (D. Md. 1991); *Blumenthal Power Co., Inc. v. Browning-Ferris, Inc.*, 903 F. Supp. 901 (D. Md. 1995); *Buckley v. Airshield Corp.*, 908 F. Supp. 299 (D. Md. 1995).

349 Md. at 164-65, 707 A.2d at 816-17.

Other jurisdictions have addressed whether a violation of the MLRPC would render a contract unenforceable. Recently, in *Gurvey v. Legend Films, Inc.*, 2012 U.S. Dist. LEXIS 131547 (S.D. Cal. Sept. 14, 2012), the United States District Court for the Southern District of California held a contract to be unenforceable as a result of it violating several rules of professional conduct of the applicable jurisdictions, specifically California, New Jersey, and New York. The Court found that the applicable rules required the plaintiff to advise the defendant company to seek independent legal counsel before entering into a business transaction with the plaintiff, i.e., an employment agreement that provided for, *inter alia*, the plaintiff's acquisition of an ownership interest in the defendant company, Legend Films, Inc. *Compare with* Rule 1.8 of the MLRPC. Plaintiff conceded that there was no signed writing between the parties, and failed to produce any writing indicating that she advised defendant to seek independent counsel. *Id.* at 31. The *Gurvey* Court also found that the Rules of Professional Conduct further obligated plaintiff to communicate the basis, rate and fees to defendant, in writing, and that plaintiff failed to offer any proof and admitted to never having received a retainer agreement from Legend. *Compare with* Rule 1.5(b) of the MLRPC (with no requirement, only preference, that the basis or rate of fee be in writing). Consequently, the *Gurvey* Court found that "even if a contract existed between the parties, the contract would be unenforceable as it violates the rules of professional conduct." Id. at 31-32 (citing *Raphael v. Shapiro*, 154 Misc. 2d 920, 587 N.Y.S.2d 68, 72 (1992) (violation of the Rules of Professional Conduct rendered contract void and unenforceable; plaintiff should not be permitted to reap the benefits of a void and unenforceable contract); *Ford v. Albany Medical Center*, 283 A.D.2d 843, 724 N.Y.S.2d 795, 797 (2001) (contract unenforceable because attorney violated the Code of Professional Responsibility); *City of N.Y. v. 17 Vista Assocs.*, 192 A.D.2d 192, 599 N.Y.S.2d 549, 553 (1993) ("Contracts contrary to public policy are unenforceable and courts will not recognize rights purportedly arising from them.")).

The Court in *Post* identified several factors for a court to consider when presented with a defense resting on Rule 1.5(e), *i.e.*, whether the rule was, in fact, violated, and, if violated (1) the nature of the alleged violation, (2) how the violation came about, (3) the extent to which the parties acted in good faith, (4) whether the lawyer raising the defense is at least equally culpable as the lawyer against whom the defense is raised and whether the defense is being raised simply to escape an otherwise valid contractual obligation, (5) whether the violation has some particular public importance, such that there is a public interest in not enforcing the agreement, (6) whether the client, in particular, would be harmed by enforcing the agreement, and, in that regard, if the agreement is found to be so violative of the Rule as to be unenforceable, whether all or any part of the disputed amount should be returned to the client on the ground that, to that extent, the fee is unreasonable, and (7) any other relevant considerations. The Court viewed a violation of Rule 1.5(e), whether regarded as an external defense or as incorporated into the contract itself, as being in the nature of an equitable defense, and principles of equity ought to be applied. *See also Edell & Assocs., P.C. v. Law Offices of Peter G. Angelos*, 264 F.3d 424, 442 (4th Cir. Md. 2001).

The purpose of the MLRPC can be subverted when the Rules are invoked by opposing parties as procedural weapons. *See* MLRPC, Scope, Comment [20]. Importantly, *Post* clearly contemplates that a defense based on the MLRPC may not be available in every circumstance. *Goldman*, 122 Md. App. at 43; s*ee Post*, 349 Md. at 168, 707 A.2d at 818. ("Although a fee-sharing agreement in

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The Second Edge...

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violation of Rule 1.5(e) may be held unenforceable, the Rule is not a *per se* defense, rendering invalid or unenforceable otherwise valid fee-sharing agreements because of rule violations that are merely technical, incidental, or insubstantial or when it would be manifestly unfair and inequitable not to enforce the agreement."). Ultimately, the court has discretion in allowing use of a violation of the MLRPC as an equitable defense. "If a court, in the exercise of its equitable discretion, orders an attorney to abide by a contractual obligation that violates the MLRPC, the order is valid and the ethical matter rests among the attorney, the client, and the disciplinary authority." *Goldman*, 122 Md. App. at 45, 712 A.2d at 8-9. "On the one hand...'it would indeed be anomalous to allow a lawyer to invoke the court's aid in enforcing an unethical agreement when that very enforcement, or perhaps even the existence of the agreement sought to be enforced, would render the lawyer subject to discipline.'" *Id.* at 44, 712 A.2d at 8. (quoting *Post*, 349 Md. at 168, 707 A.2d at 818). On the other hand, a lawyer should not be rewarded for violating the Rules of Professional Conduct. *Id.* at 44-45, 712 A.2d at 8. (citing *Potter v. Peirce*, 688 A.2d 894, 897 (Del. 1996) ("As a matter of public policy, this Court will not allow a Delaware lawyer to be rewarded for violating Delaware Lawyers' Rule of Conduct 1.5(e) by using it to avoid a contractual obligation.")). Therefore, even in cases where a violation of the MLRPC exists, and that violation is relevant to an issue at bar, a court must still proceed with caution in applying the *Post* analysis so as to avoid unnecessary application of the MLRPC, particularly in areas where these Rules should not apply.

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Dram Shop...

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While the Maryland legislature still has not enacted a statute that provides a private cause of action against taverns or vendors of alcohol, in 2011, the Court of Special Appeals recognized that a cause of action exists against a tavern for injuries caused by intoxicated patrons in some circumstances.[18] In *Troxel v. Iguana Cantina*, the plaintiff brought suit against a tavern for injuries he sustained as a result of a physical altercation with intoxicated, underage patrons.[19] The tavern filed a motion for summary judgment arguing that Maryland does not recognize dram shop liability and that the plaintiff failed to state a cause of action for negligence.[20] The trial court granted the tavern's motion.[21]

The Court of Special Appeals disagreed with the lower court, finding the plaintiff sufficiently alleged that Iguana Cantina allowed a dangerous condition to exist on its premises- increased violence on college nights at the tavern.[22] The Court found the plaintiff sufficiently alleged facts upon which relief could be granted under a premises liability theory of negligence.[23] The Court cited to the Supreme Court of Delaware, which said that although a cause of action for dram shop liability should not be judicially created, this does not "foreclose the liability of everyone who serves alcohol to an intoxicated person."[24]

Similarly, in the case of *Jane Doe v. OC Seacrets, Inc.*, the U.S. District Court of Maryland recently denied the defendant's motion for summary judgment, recognizing that a jury could find a tavern negligent for ejecting a severely intoxicated patron from its premises, and doing nothing to ensure that she returned to her hotel safely.[25] In that case, video surveillance showed that the patron was so intoxicated that she was swaying and ultimately fell over. A Seacrets employee helped her up and escorted her out of the bar and to the parking lot, where she was later attacked and raped.

Seacrets filed a motion for summary judgment, arguing that it did not own the premises on which the patron was assaulted, that Maryland does not recognize dram shop liability and that the patron was contributorily negligent and assumed the risk. That motion was denied because the Court found that a jury could reasonably conclude that the patron would not have been attacked had Seacrets followed procedures. The Court found that a jury could conclude the harm sustained by the plaintiff was reasonably foreseeable because the tavern kicked her out of the bar without doing anything to connect her with her friends or belongings.

The factual allegations in *Troxel* and *Seacrets* seem to be of the type that the Court of Appeals recognized over sixty years ago in *Hatfield* that could give rise to "an actionable wrong inde-

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Dram Shop...

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pendent on any statute."[26] As the *Hatfield* Court recognized, liability may exist- not for making a patron drunk by selling him liquor- but for additional negligent conduct.[27]

While the more recent cases have made a distinction between dram shop liability and negligence, there is a possibility that Maryland will do more than to recognize the potential for tavern premises liability. The Maryland Court of Appeals is set to hear oral argument in March on another case that may affect Maryland common law with regard to dram shop liability. In *Warr, et al. v. JMGM Group, LLC*, it was alleged that a patron spent nearly 6 hours at a tavern, consumed 20 alcoholic beverages, left the bar and was involved in an accident that killed one and injured three others.

(Endnotes)
1 Sarah D. Mann, Esq. is an Associate at Bodie, Dolina, Hobbs, Friddell & Grenzer, P.C.
2 *State use of Joyce v. Hatfield*, 197 Md. 249, 78 A.2d 754 (Md. 1951)
3 *Id.*
4 *Id.* at 251.
5 *Id.* at 254.
6 *Id.* at 252-253.
7 *Dunlap v. Wagner*, 85 Ind. 529 (1882); 1882 Ind. LEXIS 598 (1882).
8 *Id.*
9*Id.* at 531, cited by *Hatfield*, 197 Md. at 252.
10 *Hatfield*, 197 Md. at 252-253.
11 *Id.*
12 *Fedler v. Butler*, 292 Md. 174; 438 A.2d 494 (1981).
13 *Id.*
14 *Id.*
15 *Id.* at 182.
16 *Id.* at 183-184.
17 *Id.* at 184.
18 *Troxel v. Iguana Cantina, LLC*, 201 Md. App. 476, 29 A.3d 1038 (2011).
19 *Id.* at 483.
20 *Id.*
21 *Id.*
22 *Id.* at 510.
23 *Id.*
24 *Id.*
25 *Jane Doe v. OC Seacrets, Inc.*, U.S. District Court for the District of Maryland, Case No. 1:2011cv01399.
26 *Hatfield*, 197 Md. at 252-253.
27 *Id.*.

Expanding Frye-Reed...

(continued from page 9)

purposes, both trial judge Stuart Berger and the Court of Appeals rejected Dr. Geier's causation theory on *Frye-Reed* grounds. As the Court of Appeals explained, citing *General Elec. Co. v. Joiner*,[16] a *Daubert* case, Courts cannot merely accept an expert's "*ipse dixit*" or "say so" that his premises necessarily yield his conclusions: a "[g]enerally accepted methodology . . . must be coupled with generally accepted analysis in order to avoid the pitfalls of an "analytical gap."[17] When emphasizing the trial judge's role as gate-keeper, the Court did not limit the assessment of reliability to only *novel scientific* expert opinion.

D. *Khumo Tire*

The Supreme Court has explicitly abolished the *novel scientific* limitation when applying *Daubert*.[18] In *Khumo Tire*, plaintiffs claimed that a manufacturing defect caused a tire to blow out, which, in turn, resulted in numerous injuries and one death.[19] Plaintiffs' expert engineer gave his opinion that a manufacturing defect or design defect caused the blow out.[20] He based his opinions upon the combination of his knowledge of tire failures, a personal four-factor theory of the cause of tire failures, and his inspection of the tire at issue.[21]

The trial court found that the expert's methodology was subjective, that it had not been peer reviewed, that there was no indication of the rate of error, and that there was no general acceptance of the four-factor test for determining alternative causation.[22] The court granted summary judgment in favor of the defendants upon holding that plaintiffs' tire failure expert did not satisfy *Daubert*.[23] The Eleventh Circuit reversed, reasoning that *Daubert* applied only to "scientific expert testimony" and that tire expertise was not scientific.[24] The Supreme Court reversed the Eleventh Circuit, holding that the *Daubert* factors apply to all expert testimony, including areas considered "non-scientific," but that the factors a trial court relies upon may differ depending upon the area of expertise being evaluated.[25]

In so doing, the Supreme Court, like the Court of Appeals in *Blackwell*, emphasized the importance of the trial judge's role as gate-keeper, "to ensure that any and all scientific testimony . . . is not only relevant, but reliable," and explained that, "experts of all kinds [must] tie observations to conclusions."[26] Addressing the novel scientific limitation, the Supreme Court observed, "[i]t would prove difficult, if not impossible, for judges to administer evidentiary rules under which a gatekeeping obligation depended upon a distinction between "scientific" knowledge and "technical" or "other specialized" knowledge."[27]

E. *Wigmore*

Professors Kaye, Bernstein and Mnookin in *The New Wigmore: A*

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Treatise on Evidence also argue persuasively against application of any *novel scientific* limitation to *Frye* (or *Daubert*).[28] In language remarkably similar to the Court of Appeals discussion in *Blackwell*, they cite judicial gate-keeping and the problem of expert shopping as reasons for applying heightened methodological scrutiny to all expert testimony. *Id.* §10.2. They conclude that "[u]nder *Daubert* and *Khumo Tire*, substantial scrutiny of the general claim of expertise, as well as the reasoning or process by which a learned or skilled expert would apply that knowledge in the case at bar, is an integral part of admissibility determinations."[29]

F. Conclusion: Ask for a *Frye-Reed* Hearing

Frye-Reed, like *Daubert*, has become the Maryland test for assessing the reliability of an expert opinion—with the primary distinction that *Frye-Reed* has a single determinative element (general acceptance) while *Daubert* has five non-exclusive factors. Both the Court of Appeals and the Supreme Court, however, agree that trial judges must act as gate-keepers to ensure the reliability of expert opinion, and that trial judges should assess expert opinion at every stage of the analytical process. This case-by-case assessment of an expert's analysis differs substantially from the procedure envisioned by *Frye* or *Reed*, where an appellate court would consider a particular technique or method and determine whether it is reliable as a matter of law. With the movement towards a case-by-case reliability assessment, it is not practical for trial judges to be limited to assessing only *novel scientific* expert opinion.

The takeaway is that although the Court of Appeals has not explicitly abrogated the *novel scientific* requirement, litigators should consider requesting a *Frye-Reed* hearing for every kind of expert opinion. Such a hearing provides significant advantages. First, the recommended procedure is that *Frye-Reed* challenges be conducted pre-trial and out of the presence of the jury, providing an attorney with an additional opportunity to cross-examine an expert before the judge.[30] Second, failure to ask for a *Frey-Reed* hearing could constitute a waiver.[31] Finally, as it presently stands, appellate review of a *Frye-Reed* ruling is *de novo*.

(Endnotes)

1 Thomas K. Prevas, Esq. is an Associate with DLA Piper in Baltimore.

2 Committee Note to Md. Rule 5-702.

3 *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1924).

4 *Id.*; *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993). Whether the technique or theory has been generally accepted in the scientific community is one of the five *Daubert* factors. *Daubert* rulings are reviewed for abuse of discretion.

5 *Reed v. State*, 283 Md. 374 (1978) (holding that voiceprint recognition is not sufficiently reliable in the relevant scientific community to be admissible to identify a defendant in a rape case and thus deciding use of that technique for future cases).

6 *Id.* at 381.

7 *Id.*

8 *Id.*; *Wilson v. State*, 370 Md. 191, 201 n.5 (2002) (*Frye-Reed* is reviewed *de novo*).

9 392 Md. 339, 372 (2006). Comparative bullet lead analysis was a forensic technique used in criminal investigations to link a bullet at the scene of the crime to ammunition found in the defendant's possession. The technique depended on the homogeneousness of a single vat or ingot of lead, from which all of the bullets in a single box were created. The Court of Appeals held that experts in the field no longer generally accepted that a single vat or ingot of lead was homogenous.

10 *See, e.g., Blackwell*, 408 Md. at 575 (causal link between Thimerosal and autism); *Montgomery Mutual Ins. Co v. Chesson*, 399 Md. 314 (2007) (causal link between sick building syndrome or toxic mold and plaintiff's injuries); *Myers v. Celotex Corp.*, 88 Md. App. 442 (1991) (causal link between asbestos and plaintiff's cancer).

11 *See, e.g., Frye*, 293 F. at 1013 (admissibility of polygraph or lie detector test to show guilt or innocence); *Reed*, 283 Md. at 374 (admissibility of voiceprint spectrograph to identify defendant); *Clemons*, 392 Md. at 339 (involving complicated metallurgy principles for determining whether bullets from a single vat or ingot are sufficiently homogeneous).

12 370 Md. 191 (2002).

13 *Id.* at 211.

14 *See, e.g., Armstead v. State*, 342 Md. 38, 80 n.33 (1996) (internal citations omitted) ("The *Frye-Reed* test often will not apply to statistical calculations because the choice between alternative statistical techniques, although subjective, is often merely a choice between equally valid methods of describing the same underlying scientific data. . . . There are, however, instances, as in this case, where the proper choice of statistical techniques is dependent on an underlying scientific phenomenon or principle.).

15 408 Md. 575, 605 (2009).

16 522 U.S. 136 (1997).

17 *Id.* at 608.

18 *Khumo Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999).

19 *Id.* at 142.

20 *Id.* at 145.

21 *Id.* at 142-45.

22 *Id.* at 145.

23 *Id.*

24 *Id.* at 146.

25 *Id.*

26 *Id.* (quoting *Daubert*, 509 U.S. at 589).

27 *Id.* at 147-49, 151 (internal citations omitted).

28 *See* §§8.1 & 10.4.

29 *Id.* §10.4.

30 *Clemons v. State*, 392 Md. 339, 347-48 n.6 (2006); *see* Md. Rules 5-103(c) & 5-104(c).

31 *Addison v. State*, 188 Md. App. 165 (2009).

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